Supreme Court, U.S.
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No. 02-

In the Supreme Court of the United States

WILLIAM P. FORD, ET AL.,

Petitioner,

v.

JOSE GUILLERMO GARCIA

AND

CARLOS EUGENIO VIDES-CASANOVA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case was brought under the federal Torture Victim Protection Act (TVPA) by the families of four American Churchwomen serving in El Salvador who were kidnapped, raped and murdered by Salvadoran troops under the command of the respondent Salvadoran generals. At trial the judge decided that the families must prove "proximate cause" between the generals' actions and the specific atrocities committed against the Churchwomen. The court of appeals, by divided vote, declined to consider the merits of the families' challenge to this instruction by invoking the so-called "invited error" doctrine.

1. Is the "invited error doctrine" subject to no exceptions, as the Eleventh Circuit held in this case, so that a reviewing court has no power to remedy a judgment tainted by a plain error of law, or does the reviewing court have the power to reach and remedy such errors in the interest of justice, as at least five other circuits have held?

2. Under the tort doctrine of "command responsibility" adopted by the TVPA, must the victim establish "proximate cause" between the commander's acts and the specific abuse committed against the victim, as the trial court below held, or is proximate causation not an appropriate element of liability, as the Ninth Circuit has held?

3. In a case where liability is predicated on the command responsibility doctrine, does the victim or the commander bear the burden of proving whether the commander had the power to control the troops who committed atrocities and failed to take all reasonable measures to control those troops?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Plaintiffs (Petitioners in this Court)
William P. Ford
Julia Clarke Keogh
James Kazel
Michael R. Donovan

The Plaintiffs are relatives and representatives of the estates of three nuns and a layperson ("the Churchwomen") who were raped and murdered in El Salvador:

Maryknoll Sister Ita C. Ford
Maryknoll Sister Mary Elizabeth "Maura" Clarke
Ursuline Sister Dorothy Kazel
Lay Missionary Jean Donovan

Defendants (Respondents in this Court)
José Guillermo García
Carlos Eugenio Vides-Casanova

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The opinion of the court of appeals (Pet. App. 1a-29a) is reported as *Ford* v. *Garcia*, 289 F.3d 1283 (11th Cir. 2002).

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (2002) and the Torture Victim Protection Act (TVPA), 28 U.S.C § 1350 note (2002). The opinion and judgment of the court of appeals affirming the judgment of the trial court were entered on April 30, 2002. A timely petition for rehearing and rehearing *en banc* was denied on June 20, 2002. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1) (2002).

STATUTORY PROVISIONS INVOLVED

The TVPA, P.L. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 note, provides in pertinent part:

> **"Sec. 2. Establishment of civil action.**
>
> "(a) Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –
>
> "(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> "(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable to the individual's legal representatives, or to any person who may be a claimant in an action for wrongful death."

STATEMENT

1. **Introduction**. Between 1980 and 1992, El Salvador was engulfed in civil strife in which tens of thousands of civilians were tortured, subjected to other human rights abuses, or killed. During the early period of this conflict, thousands of people were indiscriminately massacred or selectively assassinated by military operations that targeted civilians, including priests and nuns, union leaders, land reform workers, and others believed to be opponents of the ruling junta.

Among the victims were four American women working with the Catholic Church in El Salvador: Maryknoll Sisters Ita Ford and Maura Clarke, Ursuline Sister Dorothy Kazel, and lay volunteer Jean Donovan. On December 2, 1980, five members of the Salvadoran National Guard abducted, raped and murdered these four women. In subsequent news accounts, government investigations, and documentary films, these victims have become known as "the Churchwomen." Petitioners are their relatives and representatives of their estates suing on their behalf.

The five Guardsmen who raped and murdered the Churchwomen were under the command of the two Respondents, the defendants in this case: General Carlos Eugenio Vides Casanova ("General Vides") and General José Guillermo García ("General García"). General García was the Minister of Defense of El Salvador from 1979 to 1983 and commanded all of the Salvadoran military and security forces, including the National Guard. General Vides was from 1979 to 1983 the Director General of the Salvadoran National Guard and, as such, the commander of the five Guardsmen who raped and killed the Churchwomen. The National Guard comprised a full-time, legally constituted

military force that was organized in a traditional, military hierarchic structure. It was responsible for the country's internal security. Trial Transcript ("Tr.") 1217-1218; 372.

The essential facts are not in dispute.[1] The Generals conceded at trial that five Guardsmen, who were under their command, raped and murdered the Churchwomen; that they were aware of a pattern of human rights abuses conducted by soldiers under their command; and that they did not prevent or repress such abuses during their tenures as Minister of Defense and Commander of the National Guard, respectively. The crucial issue at trial was the assignment of responsibility for the crimes against the Churchwomen.

2. Role of the Armed Forces Commanded by Respondent Generals in Committing Torture and Murder. On October 15, 1979, a military coup led by "reformers" overthrew the former dictatorship of General Carlos Humberto Romero and established the Revolutionary Government Junta. Tr. 341-343; Ex. 5 at 136. Composed of civilian and military members, the new government appointed then-Colonel García as Minister of Defense. Tr. 1665. As Minister of Defense, García commanded all six branches of El Salvador's security services: the Army, Air Force, Navy,

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[1] Unless otherwise noted, the following background events on El Salvador are set forth primarily in the following documents admitted into evidence: U.N. Truth Commission Report, Ex. 1, at 27-30 (brief chronology of 1980-1982 violence), 58-62 (murder of six Democratic Revolutionary Front leaders), 127-131 (murder of Archbishop Romero); 131-138 (death squad activities, and 139-141 (murder of Zamora). The description of the Churchwomen's abduction and murder is based on the U.N. Report, Ex. 1 at 62-66, the Tyler Report, Ex. 22, at 13-21; and the Rogers/Bowdler Report, Ex. 119.

National Police, Treasury Police, and National Guard. Tr. 1217. García in turn appointed then-Colonel Vides to head the National Guard. Tr. 1085.

Despite the change in government, battles between reformists and military forces allied with the landed elites began erupting in the streets. In January 1980, all civilian ministers resigned. That left Defense Minister García and his Vice Minister as the only remaining cabinet members, even though the Archbishop of San Salvador called for García to resign as well. Tr. 2094-2097. On January 22, 1980, a coalition of opposition groups held a massive demonstration in San Salvador. Ex. 42. Archbishop Romero described the demonstration as peaceful. Nonetheless, General Vides's National Guard attacked the demonstrators, killing as many as 50 people and wounding hundreds more. Anti-government violence exploded. Ex. 1 at 27.

In early February, U.S. Ambassador Frank Devine informed the State Department that mutilated bodies were again appearing on roadsides just as they had during the prior regime and that the extreme right was arming itself in concert with the military to suppress leftist groups. Later that month, Christian Democratic Party ("PDC") leader and Chief State Counsel Mario Zamora was murdered in his home. A few days earlier, former National Guard Major (and notorious death squad leader) Roberto D'Aubuisson had publicly accused Zamora and other PDC leaders of being "communists" and members of a guerilla group. Although a cursory investigation was begun, no one was ever arrested for Zamora's murder. See Ex. 1 at 139-141.

A month later, on March 16, in one of his final homilies, Archbishop Romero of San Salvador spoke of hundreds of people who had fled their homes from Cinquera, Cha-

latenango, where Sisters Ford and Clarke were stationed, and other communities. He declared publicly that "a large number of National Guards and members of ORDEN [a paramilitary group organized by a former National Guard leader] burned their houses and crops, in addition to killing people in cold blood * * *. We are alarmed to see that the killings, persecutions, disappearances and human rights violations in general have not come to a stop, but rather, on the contrary, continue to increase * * *." Ex. 30 at 19. In his last sermon in the Cathedral of San Salvador on Sunday, March 23, 1980, Archbishop Romero appealed directly to the members of the armed forces: "I beseech you, I beg you, I order you, in the name of God, to stop the repression!" Ex. 1 at 128; Tr. 2100. The next day, while celebrating Mass, Archbishop Romero was shot dead by a sniper.

More than 50,000 people attended his funeral, but he was not allowed to rest in peace. After a bomb exploded outside the Cathedral, the panic-stricken crowd scattered, only to be met by machine-gun fire. As many as 40 more people died and more than 200 people were wounded. Ex. 1 at 28.

On May 7, 1980, D'Aubuisson was arrested along with a group of soldiers. The raid confiscated documents (Exs. 98 and 99) implicating D'Aubuisson's group in organizing Archbishop Romero's murder and other death-squad activities. Nevertheless, the government released D'Aubuisson. Despite the compelling evidence of the group's death-squad activities, as well as subsequent testimony by an informant, neither D'Aubuisson nor the others arrested with him were prosecuted for murdering Archbishop Romero or for any of their other crimes. See Ex. 1 at 127-131; Tr. 480.

On November 27, 1980, a few days before the Churchwomen were kidnapped from the San Salvador airport, six leaders of the Democratic Revolutionary Front ("FDR"), the largest and most important coalition of nonviolent opposition groups, were abducted by paramilitary and security forces. In broad daylight in the heart of San Salvador as many as two hundred armed men kidnapped the six FDR leaders from a school that also housed the Socorro Juridico, the Christian Legal Aid office. According to a State Department cable, the "bullet-ridden corpses of the leaders were later found showing signs of torture, dismemberment and strangulation." Ex. 114.

General Vides admitted that the school was under constant surveillance by the National Guard, but he could not explain how the kidnapping occurred during such surveillance. Tr. 1255-1256. The U.N. Truth Commission Report, however, subsequently found that General Vides' security forces were directly involved in these atrocities. Ex. 1 at 60. A secret CIA memorandum, dated December 1, 1980, reported that General García, in a meeting with other officers, acknowledged the military's responsibility for the FDR murders and expressed approval of the crime. Ex.109.

These were only some of the most notorious cases of abduction, torture and murder by death squads composed of Army soldiers, the Treasury Police, and the National Police—all under the command of General García—and the National Guard, under the direct command of General Vides. See generally Ex. 1 at 43-45, 131-138. These death squads targeted teachers and students, doctors and nurses, agricultural reformers, labor unionists, and religious leaders, including priests, nuns and lay missionaries. Members of the church were targeted because they worked with the poor and were thus seen as "subversives." Often death squads would

torture their victims before murdering them, terrorizing civilians by leaving corpses along the side of the road as a warning. An estimated 9,000 civilians died in 1980 at the hands of death squads and during military operations. Ex. 111 at 4. Despite their respective positions as Minister of Defense and National Guard commander, Generals García and Vides did not prevent these abuses or bring the perpetrators to justice.

Ominously, a November 29, 1980 cable from then-U.S. Ambassador White reported: "Those who kidnapped the FDR leadership warned the priests they are next if they did not stop poisoning the minds of the young." Ex.107. Three days later, five Guardsmen raped and murdered the Churchwomen.

3. Abduction, Rape and Murder of the Churchwomen. In late November 1980, Maryknoll Sisters Ita Ford and Maura Clarke left their station in Chalatenango, El Salvador, to attend a meeting of Central American Maryknolls in Nicaragua. A week later, on December 2, 1980, they returned to San Salvador. Ursuline Sister Dorothy Kazel and lay worker Jean Donovan drove to the San Salvador International Airport to meet them. National Guardsman Perez Nieto, who had observed Kazel and Donovan on a trip to the airport earlier that day, recognized their van. Upon his return to the Guard barracks, he reported his observations to Subsergeant Colindres Aleman, who ordered five other Guardsmen to change out of their uniforms into civilian clothes and to accompany him and Perez Nieto with their service rifles. The Subsergeant and the five Guardsmen in civilian clothes went with Perez Nieto, who was still in uniform, to a traffic checkpoint near the International Airport entrance. There, the Subsergeant instructed Perez Nieto to stop all traffic at the checkpoint for about ten minutes, but to

let the Churchwomen's van pass. The Guardsmen then took up positions down the road and awaited the van.

When the van reached the Guardsmen's position, the Subsergeant questioned the Churchwomen and then ordered three Guardsmen into the van with them. With the Subsergeant and two other Guardsmen following in a jeep, the Churchwomen began a fifteen mile journey into the hills of El Salvador. They would not return alive.

When the Guard jeep following the Churchwomen's van experienced mechanical problems, the party drove to the National Guard command post in El Rosario. The Subsergeant ordered one of his men to stay with the jeep as the rest crammed into the Churchwomen's van and drove toward Zacatecoluca. The International Airport and Zacatecoluca are both in La Paz province, which was under the command of General Vides' cousin.

After leaving the main road and driving along a dirt road, the van pulled into a deserted area. The Subsergeant ordered everyone out. There, the Guardsmen raped and abused the Churchwomen. When they were done raping them, the Guardsmen shot the Churchwomen at point blank range with their service rifles, leaving them where they fell.

There is only surmise whether the Churchwomen were gang-raped by the National Guardsmen and whether each of the Churchwomen was forced to watch as her sisters were raped and murdered. The record does demonstrate that Sr. Maura Clarke was so abused by her tormenters that her face was destroyed. Ex. 22 at 21. Bloody bandanas and the underwear of three of the women were found separately alongside the bodies. *Ibid.*; see Ex. 24.

When the Churchwomen's murder became known, American outrage was immediate. The Salvadoran Junta, however, appointed an Army colonel to investigate the Churchwomen's death. General (then-Colonel) Vides put a National Guard major in charge of a parallel investigation. Both a United Nations Commission and an American investigation later concluded that the two Salvadoran investigations were a sham and that they sought to cover up the Guardsmen's responsibility for the murders. Ex. 1 at 63-64, Ex. 22 at 21-33.

Indeed, National Guard executions were so brazen that, a month after the Churchwomen's murders, Guardsmen murdered two more Americans—this time while the victims were eating dinner in the San Salvador Sheraton Hotel. These Americans were advising the President of the Salvadoran Institute for Agrarian Reform, who was also murdered. See Ex. 1 at 144-147. In December 1981, a year after the Churchwomen's murder, García and Vides were both promoted to General. Tr. 2154.

Three years after the Churchwomen's murder—after constant prodding from the U.S. government—the five Guardsmen were convicted by a Salvadoran court for committing the crimes. Tr. 2295. The convictions were the first convictions against members of the military for human rights abuses inflicted during the Generals' command. Ex. 1 at 65. They remain among a handful of convictions of armed services members for the thousands of human rights abuses conducted by the military and death squads during the Defendants' tenure. Tr. 349, 1815.

4. Complaint and Trial. The Generals now live in Florida. In May 1999, the families of the Churchwomen filed suit against them in the Southern District of Florida.

The families have been represented throughout by volunteer pro bono counsel. Invoking the "command responsibility" doctrine incorporated in the TVPA, the families alleged that the atrocities against the Churchwomen were part of a pattern of extrajudicial killings and other abuses committed by the Generals' troops. This doctrine assigns liability to commanders for the human rights abuses of their troops under three conditions: (1) there is a superior-subordinate relationship, (2) the commander knew or should have known of such abuses, and (3) the commander failed to prevent or repress such abuses.

At trial, the Generals conceded that (1) the five National Guardsmen raped and murdered the Churchwomen, (2) the Guardsmen were under their command, (3) the military and their allied death squads murdered and tortured thousands in El Salvador during the year preceding the rape and murder of the Churchwomen and throughout the Generals' tenure, (4) they were aware of this horrific pattern of human rights abuses by their subordinates during the year preceding the Churchwomen's murder, and (5) they did not prevent these abuses. Tr.1092-1093, 1102-1103, 1138, 1677-1678 (García); Tr. 1228-1230, 2211 (Vides).

The Generals argued that they had tried to stop the human rights abuses, but that they could not always control their troops. Tr. 1671-1672 (García); Tr. 1258-1259 (Vides).

After the close of evidence, the trial judge instructed the jury that the doctrine of "command responsibility" required Petitioners to prove two elements that were actually part of the Generals' burden of proof as affirmative defenses. The court instructed that the Plaintiffs must prove (1) that the Generals had "effective command" over the Guardsmen—which the court defined as both formal command authority

and the "practical ability" to control their troops—and (2) that the Generals "failed to take all necessary and reasonable measures within [their] power" to prevent or repress killings and torture by their subordinates. Pet. App. 30a-31a. But well-established law places the burden on a defendant military commander to prove the converse of these propositions *as affirmative defenses*—that the commander took all necessary measures to control his subordinates and that, despite these measures, he lacked control over the offending troops.

In addition, the court required Plaintiffs to prove that the Generals' failure to fulfill their "obligations" was the "proximate cause" of the Churchwomen's rape and murder. *Id.* at 31a-32a. The trial judge did so despite case law recognizing that proximate cause is irrelevant under the doctrine, and despite the judge's recognition of a Ninth Circuit case that had expressly ruled otherwise. *Id.* at 32a. (citing *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996)). After soliciting and considering multiple drafts submitted at the judge's request to embody his rulings, the judge crafted instructions that contained the errors described above.

The jurors evidently focused on liability under the command responsibility doctrine and exhibited their confusion by submitting no fewer than five questions to the judge—every one of them concerning proximate causation or liability under the command responsibility doctrine. Tr. 2545, 2550. But the judge merely repeated his original explanation without correcting any of the mistaken instructions. Tr. 2532-2564. Thus mis-instructed, the jury returned a verdict for the Generals.[2]

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[2] It is telling that, in a similar case brought against the same Generals by three other torture victims, where the instructions did (cont'd)

5. Decision on Appeal. The court of appeals affirmed. The court concluded that there was no "plain error" in the trial judge's instruction concerning the allocation of the burden of persuasion on the Generals' ability to control their troops. The court acknowledged that the authorities recognize that proof of a *de jure* command relationship creates a "presumption of effective control" and establishes a "*prima facie* case" of liability under the command responsibility doctrine. Nevertheless, the court concluded that these authorities merely impose upon the defendant a burden of *production* rather than the burden to prove as an *affirmative defense* that he was unable control his subordinates despite making all reasonable efforts to do so. Pet. App. 13a-14a.

On the crucial question whether the Plaintiffs had to show that the Generals' misconduct was the "proximate cause" of these specific atrocities, the court sidestepped the issue. The court asserted that Plaintiffs had "invited" the error in the proximate cause instruction, because "the instruction eventually given to the jury reflected changes that Appellants themselves proposed and to which they did not later object" and declared that "invited error," no matter how fundamental, is never reviewable. *Id.* at 17a. The court invoked this absolute "invited error" bar *sua sponte*; the respondent Generals had argued only that the more flexible "plain error" test was the appropriate standard of appellate review.

(... cont'd)

not contain these errors, a jury returned a verdict for the plaintiffs in the aggregate amount of $54.6 million. See *Romagoza* v. *Garcia*, No. 99-8364, Final Judgments entered July 31, 2002 (S.D. Fla.); David Gonzalez, *Torture Victims In El Salvador Are Awarded $54 Million*, N.Y. TIMES, July 24, 2002, at A8.

As Judge Barkett explained in her reluctant concurrence, "our Circuit precedent holds that if error is invited, we may not review the error even if it is harmful." *Id.* at 26a. In her concurring opinion, however, she addressed the trial court's proximate cause instruction. She explained that the instruction was erroneous because, as the Ninth Circuit had ruled in the decision the trial judge had refused to follow, "a proximate cause requirement practically eviscerates the command responsibility doctrine's theory of liability." *Id.* at 28a. She correctly observed: "It is not surprising * * * that no opinion addressing the doctrine includes proximate cause as a required element of proof." *Ibid.*[3] Noting the jury's several questions about the interaction between command responsibility and proximate cause, Judge Barkett concluded that "the jury may have found the Generals responsible for the crimes against the nuns but for the court's erroneous proximate cause instruction." *Id.* at 29a. Finally, Judge Barkett emphasized that "there is no evidence that counsel for the objecting party permitted the error in bad faith." *Ibid.*

Judge Barkett agreed, however, that the crucial and fundamental error in the instruction was "invited" within the meaning of circuit precedent and, under this precedent, could not be reviewed under any circumstances. *Id.* at 26a. She urged the court to "reconsider that precedent," explaining that the error in this case would satisfy the "exceptional situation" exception to the "invited error" doctrine recognized by several other circuits. Pet. App. 26a (citing *United States* v.

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[3] Judge Barkett cited two cases that explicitly *reject* the notion that a plaintiff must prove proximate cause in addition to the three elements of command responsibility. Pet. App. 28a (citing *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996); *Prosecutor* v. *Delalic*, Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶ 398-400).

Sharpe, 996 F.2d 125, 129 (6th Cir. 1993); *United States* v. *Ahmad*, 974 F.2d 1163, 1165 (9th Cir. 1992)). As she explained: "The erroneous proximate cause instruction * * * led to 'substantial injustice' warranting reversal of this judgment because the juror questions offer strong evidence of confusion and suggest that the jury's determination was significantly influenced by a legally erroneous instruction." Pet. App. 29a. Rehearing *en banc*, however, was denied.

REASONS FOR GRANTING THE WRIT

I THE ELEVENTH CIRCUIT'S DECISION, IN CONFLICT WITH OTHER CIRCUITS, POSES AN IMPORTANT QUESTION REGARDING THE POWER OF APPELLATE COURTS TO REVIEW "INVITED" ERRORS THAT PREJUDICE THE OUTCOME OF A CASE.

Despite the call from Judge Barkett to reconsider the Eleventh Circuit's "invited error" precedent as conflicting with the sound approach uniformly followed in other circuits, the full court refused rehearing *en banc*. In categorically ruling out any exception to the invited error doctrine, the Eleventh Circuit's doctrine directly contradicts every other circuit that has addressed the issue, conflicts with the Federal Rules of Civil Procedure and the statute governing appellate review, and creates an ill-conceived rule of law. Indeed, the Eleventh Circuit's conception of the "invited error" doctrine is so clearly incorrect and had so obvious an impact upon the instant case that this Court should summarily reverse the decision below. Alternatively, this Court should grant certiorari to resolve the significant conflict between the Eleventh Circuit and the five circuits that have acknowledged an exception to the "invited error" rule.

A. Governing Statute and Rules. The Eleventh Circuit has announced and routinely applied a doctrine that renounces the power to review any error, no matter how clear and decisive, if it views the error as "invited." See, *e.g.*, Pet. App. 17a; *United States* v. *Fulford*, 267 F.3d 1241, 1247 (11th Cir. 2001). This self-abnegation, however, improperly abandons the authority Congress entrusted to that court and every other federal appellate court. Under 28 U.S.C. § 2106 (2002), a court of appeals

> "*may* affirm, modify, *vacate, set aside or reverse any judgment*, decree, or order of a court *lawfully brought before it for review*, and may * * * direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had *as may be just under the circumstances*." (Emphasis added.)

The thrust of the statute is to direct federal appellate courts to focus on determining what disposition is "just under the circumstances." It leaves no room for absolute rules that bar consideration even of serious errors identified by appellants.

This focus on doing what is "just" is also the principal theme embodied in the Federal Rules of Civil Procedure and the cases decided under it. As stated in Rule 1, the purpose of the Rules is to "secure the *just* * * * determination of every action." (Emphasis added.) In the precise context in which the present case arises—a challenge to decisively erroneous jury instructions—the Eleventh Circuit's approach runs afoul of the Federal Rules of Civil Procedure and this Court's application of them. The Eleventh Circuit's approach is inconsistent with the recognized doctrine that, even in the absence of an objection, an appellate court has the power to notice "plain errors affecting substantial rights."

This doctrine rests on the principle that the goal of appellate review is to achieve substantial justice in the outcome of cases, not to interpose procedural rules as a device for defeating a just outcome.

Thus, Rule 51 declares that no appellant "may assign as error" the giving of an instruction, unless the appellant had raised an objection to the instruction "before the jury retires to consider its verdict." Nevertheless, the courts have long agreed that this restriction must yield, in the interests of justice, to the power and responsibility of reviewing courts to notice and remedy "plain errors affecting substantial rights." See *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 n.13 (1981) (collecting cases). Indeed, in *Fact Concerts*, this Court rejected the argument that the sweeping language of Rule 51 should be read literally so as to bar review of erroneous jury instructions, even where the law was *not* clear enough to make an alleged error in a crucial instruction "plain." Instead, the Court concluded that it was appropriate to address the soundness of the instruction because, just as in this case, the trial judge had "reached and fully adjudicated the merits" of the legal issue underlying the instruction, even though the party aggrieved had not objected to the instruction. *Id.* at 256.

In this case, the trial judge expressly considered the legal validity of a proximate cause instruction. He acknowledged that the Ninth Circuit in *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996), had held that proximate cause is irrelevant in a command responsibility case. But he declined to follow *Hilao*. See Pet. App. 32a-33a. Under these circumstances, just as in *Fact Concerts*, "no interests in fair and effective trial administration * * * would be served if [the appellate court] refused * * * to reach the merits." 453 U.S. at 256.

Although *Fact Concerts* did not involve allegedly "invited error," Rule 51 draws no such distinction about the source of the errors that are subject to appellate review. The Court's rationale for declining to find a "waiver" of appellate review of a legal issue the trial judge actually decided—"fair and effective" resolution of a "novel question" (453 U.S. at 255-56)—applies equally here.

Nothing in the Federal Rules purports to strip appellate courts of their statutory power and responsibility to render decisions that achieve "substantial justice" simply because the crucial error tainting the judgment was, in some sense, "invited."[4] Reflecting this focus on the justness of the outcome, Rule 61 of the Federal Rules of Civil Procedure specifies that a reviewing court may not treat as "harmless error" "any error or defect in the proceeding" that is "*inconsistent with substantial justice*" or that adversely "*affect[s] the substantial rights of the parties*" (emphasis added). The Eleventh Circuit's absolute rule of non-reviewability will-

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[4] This is not a situation in which the party later complaining about the ruling on appeal had taken the initiative to urge the erroneous legal principle on an unsuspecting judge. Rather, after considering *sua sponte* the Ninth Circuit's decision in *Hilao* on this issue, the trial judge made an independent determination on the legal issue: "I think *in reflecting on it, it is the proximate cause instruction that is appropriate* * * *." Pet. App. 33a (emphasis added). The judge explained that "the question becomes under the concept of proximate cause whether the Plaintiff can show the Defendants[']s failure to take action is what resulted in the death of the women." *Ibid.*

After various conferences on the possible instructions, the judge asked the parties to submit draft instructions. Both sides did so. Both included "proximate cause" as a requirement, *in accordance with the judge's ruling*. Tr. 1720-21, 2051.

fully blinds reviewing courts to such errors adversely affecting a party's right to "substantial justice."

B. Conflict Among the Circuits. Against this backdrop, it is not surprising that the Eleventh Circuit's absolutist approach to "invited error" conflicts with the view of at least five other circuits. Using slightly varying formulations, every other circuit that has addressed the issue has ruled that fundamental legal errors may be raised, reviewed and remedied on appeal, even if "invited" by the appellant. See, *e.g.*, *Borden* v. *Paul Revere Life Ins. Co.*, 935 F.2d 370, 375 (1st Cir. 1991) (in "exceptional circumstances," litigant is not bound by the "choice of law which it successfully urged the trial court to follow"); *United States* v. *Herrera*, 23 F.3d 74, 76 (4th Cir. 1994) (invited error reviewable where error "tainted 'the integrity of the judicial process' * * * or 'caused a miscarriage of justice'") (quoting *Wilson* v. *Lindler*, 995 F.2d 1256, 1256 (4th Cir. 1993)); *United States* v. *Green*, 272 F.3d 748, 754 n.16 (5th Cir. 2001) (allowing for review of "invited error" if "'the error was so patent as to have seriously jeopardized the rights of the appellant'") (quoting *United States* v. *Lemaire*, 712 F.2d 944, 949 (5th Cir. 1983)); *United States* v. *Barrow*, 118 F.3d 482, 491-92 (6th Cir. 1997) ("Invited error * * * does not foreclose relief when the interests of justice demand otherwise."); *United States* v. *Schaff*, 948 F.2d 501, 506 (9th Cir. 1991) (an exception to the "invited error" doctrine is appropriate where the circumstances under which the error occurred were "exceptional").

C. Dictates of Sound Judicial Policy. As Judge Barkett explained, "the requirements of justice would be served in this case by a rule that would permit us to review an 'invited' but erroneous jury instruction where there is no evidence that counsel for the objecting party permitted the error in bad faith, and where it is clear that the jury misper-

ceived the law and based its determination on this misperception." Pet. App. 29a. The majority did not question Judge Barkett's characterization of the factors that would make review of the "proximate cause" instruction appropriate in the interests of justice. Instead, the majority viewed itself as handcuffed by circuit precedent "hold[ing] that if the error is invited, we may not review the error even if it is harmful." *Id.* at 26a (Barkett, J., concurring).

Petitioners recognize that the adversary system normally depends on counsel to make timely objections at the trial level, if errors of law are to be preserved for review. But as many other circuits recognize, and as such doctrines as "plain error" illustrate, the legal system also must be flexible enough to deal with the substantive outcomes of cases, not just the process by which those outcomes are reached.

Here, volunteer counsel was attempting to cope with a complex area of law. The trial court was aware of the only other appellate precedent on point, the Ninth Circuit's decision in *Hilao*, but specifically refused to follow it. When counsel for both sides responded to the trial judge's request that they tender proposed instructions and petitioners' counsel did so by incorporating the "proximate cause" requirement that the judge had ruled was required, this submission constituted "invited error" only in the most technical and artificial sense. As Judge Barkett observed without challenge from the majority, "there was no bad faith alleged on the part of appellants" (Pet. App. 26a) and "the jury's determination was significantly influenced by a legally erroneous instruction" (*id.* at 29a).

In short, the rule of appellate review invoked by the Eleventh Circuit in the decision below disclaims the power to review an erroneous decision in exceptional circumstances

such as those presented by this case. This rule obstructs the availability of substantial justice and calls into question the integrity of the judicial process. The Eleventh Circuit's approach, moreover, is out of step with every other circuit that has addressed the issue. This Court should grant certiorari and summarily reverse the decision below. Alternatively, this Court should grant certiorari and set the case for briefing and argument on the merits, given the evident importance of the issue and the square conflict among the circuits on the power of appellate courts to review "invited errors."

II THE QUESTION WHETHER AND TO WHAT EXTENT "PROXIMATE CAUSE" IS AN ELEMENT OF COMMAND RESPONSIBILITY IS AN IMPORTANT QUESTION ON WHICH THERE IS A CONFLICT.

The instruction that plaintiffs must establish proximate cause between the Generals' acts or omissions and the victims' rape and murder is in square conflict with a decision of the Ninth Circuit. Other opinions involving command responsibility assume that a commander bears imputed responsibility for the human rights violations committed by his subordinates, if he is aware of a pattern of abuse and does not prevent recurrence, but those opinions reflect confusion about the extent to which "proximate cause" is an element of civil liability. This Court should grant certiorari to clarify the law on this important issue.

As Judge Barkett explained in her concurring opinion, the command responsibility doctrine, properly understood, "does not require a *direct* causal link between a plaintiff victim's injuries and the acts or omissions of a commander." Pet. App. 27a (emphasis in original). Such a requirement would "practically eviscerat[e] the command re-

sponsibility doctrine's theory of liability" (*id.* at 28a), which rests on principles of the law of agency.[5] This is a doctrine of *respondeat superior* under which the commander bears imputed responsibility for the injuries inflicted by his subordinates in circumstances like those present here. Proximate cause need only be shown between the *subordinates*' conduct and the murder of the victims, a requirement that "was undisputedly established in this case: the troops raped and murdered the nuns." *Id.* at 27a. The only valid way for the commander to escape imputed responsibility is to prove that he tried vigorously but in vain to stop the abuses.

In *Hilao*, a class of victims and their families sued the estate of former Philippine President Ferdinand Marcos under the TVPA to recover for "torture, summary execution, and 'disappearance' * * * committed by the Philippine military and paramilitary forces under [his command] * * * during his nearly 14-year rule of the Philippines." 103 F.3d at 771. The district court certified the class over the objection of Marcos's estate that there were individual questions of proximate cause, *i.e.*, "whether any injury was caused by Marcos' acts or omissions." *Id.* at 774. The Ninth Circuit rejected the argument that proximate cause must be shown, explaining that "this question was resolved by the liability finding that Marcos was liable for *any* act of torture, summary execution, or 'disappearance' committed by the military or paramilitary forces on his orders or with his knowledge." *Ibid.* (emphasis added). See also Pet. App. 28a (Barkett, J., concurring) (observing that the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia

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[5] In enacting the TVPA, Congress directed that the "[c]ourts should look to * * * interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible." S. Rep. No. 102-249, at 8 (1991).

("ICTY") has "held that proof of causation is not an independent requirement for the imposition of command culpability") (citing *Prosecutor* v. *Delalic*, Judgment (Trial Chamber, ICTY Nov. 16, 1998)).

Other courts, without discussing whether and to what extent "proximate cause" is an element of liability, have assumed that a commander bears responsibility for his subordinate's acts, if the other elements of the doctrine are shown, at least where the commander generally supported the commission of abuses. For example, the Second Circuit took this approach in *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1996), a class action under the TVPA and Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA), alleging responsibility "for genocide, rape, * * * summary execution, and wrongful death" based upon Karadzic's position as President of the self-proclaimed Republic of Srpska. The Second Circuit upheld liability under the command responsibility doctrine, explaining that "the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by the military forces under his command." *Id.* at 237. The Second Circuit concluded that it was sufficient that Karadzic was responsible for the "pattern" of abuses. The court did not suggest that plaintiffs would also have to prove that Karadzic's acts or omissions were the proximate cause of the injuries that *each* of them individually sustained. In effect, the Second Circuit used an intermediate test, holding Karadzic accountable for individuals' injuries because he had caused the *pattern* of abuses.

Federal trial-level decisions under the TVPA and ATCA reflect similar variations. Sometimes they treat liability as imputed automatically when the commander *knew* of the pattern of abuses but failed to stop them. Other cases rely

on the commander's active *support* for the pattern of abuses. Compare, *e.g.*, *Paul* v. *Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994) ("Defendant Avril bears *personal responsibility for a systematic pattern* of egregious human rights in Haiti during his military rule * * * [and] also bears personal responsibility for the interrogation and torture of *each of the plaintiffs* in this case.") (emphasis added), quoted in *Hilao*, 103 F.3d at 777-78; *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 172 (D. Mass. 1995) (finding former Guatemalan Minister of Defense liable under TVPA for torture and sexual abuse of an Ursuline nun, because "plaintiffs have convincingly demonstrated that, at a minimum, Gramajo was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths"); with *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987) (finding Argentine General liable for acts of brutality committed by military personnel in the defense zone for which he was responsible).

In sum, except for this case, none of the cases requires a showing of a "proximate" link between the commander's specific acts and omissions and a particular atrocity. They do, however, reflect some confusion about the degree to which the commander must be shown to have been responsible for causing the *pattern* of abuses that eventually led to the abuse of the particular victim seeking relief. The soundest view is the one adopted by the Ninth Circuit and supported by Judge Barkett here: if a commander *knows* (as did the Generals) of a pattern of human rights abuses within his area of command and *fails to stop them*, the commander bears imputed liability—without more—for the individual atrocities (like the ones inflicted on the Churchwomen) that are *proximately caused by his troops*.

The issue is undoubtedly important. It spelled the difference between the defense verdict in this case and the verdict for the plaintiffs in the very similar *Romagoza* case, see n.2, *supra*. And the confusion about this aspect of the command responsibility doctrine evidenced by the decision below is almost certain to plague future courts adjudicating the claims of torture victims under the TVPA or ATCA. This Court should grant certiorari to clarify that proximate causation between a commander's acts and omissions is not an element of the command responsibility doctrine. At the very least, this Court should grant certiorari on the "invited error" issue, reverse the decision below in that respect, and remand to direct the Eleventh Circuit to address whether and to what extent proximate causation is relevant in a TVPA case under the command responsibility doctrine.

III IT IS IMPORTANT TO DETERMINE WHETHER THE COMMAND RESPONSIBILITY DOCTRINE IMPOSES UPON THE VICTIM OR THE COMMANDER THE BURDEN OF ESTABLISHING WHETHER THE COMMANDER HAD EFFECTIVE CONTROL OVER HIS TROOPS AND TOOK REASONABLE STEPS TO EXERCISE THAT CONTROL.

The other principal dispute between the parties concerns which party bears the burden of persuading the jury that the Generals did or did not have *effective* control of their subordinates and did or did not *take all reasonable steps* to exercise such preventive control.

The families claimed that they needed only to show *de jure* command (*i.e.*, a superior-subordinate relationship as part of a regularly organized military force), which would

then give rise to a legal presumption that the Generals had control of their troops. According to the families, any contention that the Generals had actually lacked the ability to control their troops posed an affirmative defense on which the Generals bore the burden of persuasion. The Generals, by contrast, contended that the burden rested in the first instance and at all times with the families to show that the Generals did have control over their troops and failed to take all reasonable measures to exercise that control.

The trial court agreed with the Generals and twice instructed the jury that the families had to prove that the Generals had both "the legal authority *and* the practical ability" to control the troops and also had to prove that the Generals had "failed to take all necessary and reasonable measures within [their] power to prevent or repress the commission of torture and extrajudicial killing * * *." Pet. App. 31a (emphasis added). The Eleventh Circuit affirmed, asserting that the available authorities "at least suggest that the burden of persuasion on this matter is not altogether certain" (Pet. App. 14a) and holding, therefore, that the families had failed to demonstrate *plain* error.

The Eleventh Circuit's ruling frames another important issue for this Court to resolve. The question of how to allocate the burden of persuasion in a TVPA case under the command responsibility doctrine is, to be sure, one "of first impression in the federal courts." Pet. App. 1a. But the issue is vital to a doctrine that has often been pivotal in other TVPA and ATCA cases as well as in proceedings before U.S. military and international tribunals.

This Court firmly recognized the doctrine of command responsibility in *In re Yamashita*, 327 U.S. 1 (1946), upholding the conviction and death sentence of General Ya-

mashita for failing to control his troops in the Philippines during World War II and allowing them to loot, rape, and murder. At his criminal trial before a military commission, Yamashita's counsel undertook to "show *affirmatively* that the Accused * * * had no actual control of the perpetrators of the atrocities at any time they occurred * * *." *Yamashita* Military Commission Tr. 2959 (emphasis added). As both the majority and the dissenters noted, it was Yamashita who had assumed the burden of trying to prove that he *lacked* control because of the onslaught of American military forces. 327 U.S. at 17, n.4 (majority); *id.* at 32-33 (Murphy, J., dissenting); *id.* at 51, n.15 (Rutledge, J., dissenting). Yamashita tried—unsuccessfully—to prove that his troops "fail[ed] to obey" his orders to withdraw from Manila before they committed the massacres. 327 U.S. at 33 (Murphy, J., dissenting).

Under other analogous precedents, a *lack* of control over one's troops is to be treated as an *affirmative defense* on which the defendant commander bears the burden of persuasion. As one international tribunal has recently written, "a court may presume that possession of [*de jure*] power *prima facie* results in effective control unless proof to the contrary is produced." *Prosecutor* v. *Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 197.

Proof that a military commander had formal authority to direct his subordinates thus raises a presumption that his troops would obey his commands to desist from committing atrocities, if the commander gave those orders and sought to enforce them. See III THE LAW OF WAR ON LAND, MANUAL OF MILITARY LAW ¶ 631, p. 178 n.1(a) (1958) (British military code) ("The failure to [ensure compliance with the laws of war] raises the *presumption*—which for the sake of the effectiveness of the law *cannot be regarded as easily rebuttable*—of authorization, encouragement, * * * or subsequent

ratification of the criminal acts.") (emphasis added); Canadian War Crimes Reg. 10(4), reprinted in IV THE UNITED NATIONS WAR COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS, Art. IX, p. 128 (1948) (a pattern of war crimes by subordinates is "*prima facie* evidence of the responsibility of the commander for those crimes").

This presumption satisfies the victim's burden, unless the commander establishes that he lacked such control and tried unsuccessfully to take all reasonable steps to repress the abuses. After all, it is the commander who is far better situated to produce any persuasive evidence about limits on his capacity to control his troops and the preventive measures he supposedly tried to take. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to * * * conform with a party's superior access to proof."); *Green Tree Fin. Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 96 (2000) (Ginsburg, J., dissenting) (observing that "where fairness so requires, burden of proof of a particular fact may be assigned to [the] 'party who presumably has peculiar means of knowledge' of the fact") (quoting 9 J. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981)).

The analysis by the court below confused the issue by declaring that, in conventional contexts, a "presumption" does not shift the burden of persuasion, which remains with the party in whose favor the presumption runs. The international authorities, however, do not speak of a "presumption" of culpability in the trial-management or evidentiary sense in which American courts use this concept. Cf. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 524 (1993) (employment discrimination litigation). Those authorities view this "presumption" as a principle of law governing imputed liability, not a mere rule of evidence. See, *e.g.*, U.S. DEPARTMENT OF

THE ARMY FIELD MANUAL, ARMY LEADERSHIP, BE, KNOW, DO, Art. 1-60, 1-61 (1999) (treating responsibility for war crimes as "incident" to the "legal position" of command). Thus, the Eleventh Circuit's analysis of traditional evidentiary privileges misses the point in concluding that the accused military commander can neutralize the *legal* principle that he is accountable for the atrocities committed by his troops simply by offering *some evidence* of a lack of control.

In any event, the jury was never told about even the Eleventh Circuit's watered-down concept of the Generals' legally *presumed* accountability. The jury was never told that the other elements of the doctrine of command responsibility, coupled with formal legal authority over the rapists and murderers who committed these depredations, were sufficient *without more* to carry the plaintiffs' burden on the "control/lack of reasonable measures" element—even if this is a separate element of liability on which plaintiffs must bear the burden of persuasion. See *Hicks*, 509 U.S. at 511 (if jury does not accept the defendant's proffered defense, presumption is sufficient to "*permit* the trier of fact to infer the ultimate fact of intentional discrimination") (emphasis added).

Who actually bears this burden is of crucial importance in any command responsibility case, including this one. This Court should grant certiorari in order to ensure that this essential remedy is not stripped of practical significance by an unwarranted allocation of the burden of proof to victims.

IV THIS COURT'S REVIEW IS WARRANTED.

On two levels, the issues posed by this case are important. Unfortunately, widespread abuse of human rights at the hands of public officials continues around the world. The public policy of the United States, as reflected in the ATCA and the TVPA, is to provide a federal judicial forum to make

meaningful redress available when the perpetrators of those crimes against humanity are found within our borders. The decision below drastically reduces the protection available to victims and undercuts their right to civil remedies. The Eleventh Circuit should not be left as a haven for renegade military and political leaders whose misconduct violated accepted international norms of responsible, civilized behavior.

On a more specific level, this case has been a *cause célèbre* since these Churchwomen women were raped and murdered. It has been the subject of formal investigations by a United Nations commission and by the United States Government. See n.1, *supra*. It was the subject of a feature film, CHOICES OF THE HEART (1983), and of continuing media coverage about the murders, their aftermath, and the trial below, including a recent PBS documentary about the murders and about this case, JUSTICE AND THE GENERALS (2001).[6] The murder of the Churchwomen was a watershed event in U.S. foreign policy in Central America. As Harold Evans wrote in his epic history of our country in the twentieth century, "President Carter angrily demanded that the killers of the nuns be brought to justice" and he "cut off all aid" to El Salvador. Harold Evans, *With Friends Like These*, in THE AMERICAN CENTURY 636-37 (1998). When Congress restored aid, it did so with the condition that the

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[6] See also, *e.g.*, Pamela Mercer, *Slain Nuns' Families Sue Salvadoran Generals*, N.Y. TIMES, May 13, 1999, at A19; Larry Rohter, *4 Salvadorans Say They Killed U.S. Nuns on Orders of Military*, N.Y. TIMES, April 3, 1998, at A1; Christopher Dickey, *El Salvador: Not Today, Not Tomorrow,* NEWSWEEK, December 7, 1998, at 16; Marjorie Hyer, *Four Murders Trigger U.S. Catholic Protests*, WASH. POST, December 10, 1980, at A7; John M. Goshko, *U.S. Halts Salvadoran Aid*, WASH. POST, December 6, 1980, at A1.

president certify that the government in which these two Generals had served was making meaningful progress toward protecting human rights.

The most appropriate forum for fixing the Generals' accountability, however, is a federal courtroom. Nevertheless, this most important stage in the process has been compromised. Fundamental errors consciously ignored by the Eleventh Circuit denied these murdered women and their families their last real chance for obtaining justice. Now only this Court can say whether they can have their claims fairly adjudicated by a jury applying the rules of law by which the conduct of the Generals should have been measured.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below summarily reversed. Alternatively, the case should be set for briefing and argument on the merits.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX

[DECISION BELOW – REPORTED AT 289 F.3d 1283 (2002)]

United States Court of Appeals,
Eleventh Circuit.

William P. FORD, for and on behalf of the ESTATE OF Ita C. FORD, Julia Clark Keogh, for and on behalf of the Estate of Mary Elizabeth Clarke, a.k.a. Maura Clarke, et al., Plaintiffs-Appellants,

v.

Jose Guillermo GARCIA, an individual, Carlos Eugenio Vides-Casanova, an individual, Defendants-Appellees.

No. 01-10357.

April 30, 2002.

Appeal from the United States District Court for the Southern District of Florida.

Before CARNES, BARKETT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

The main issue presented in this appeal, one of first impression in the federal courts, is the allocation of the burden of proof in a civil action involving the command responsibility doctrine brought under the Torture Victim Protection Act. This appeal also presents the issue of whether the district court committed reversible error in allowing a defense witness to testify as an expert where Defendants-Appellees

did not comply with all of the local rules regarding expert witnesses.

I. Background

Three nuns and one layperson (the "churchwomen"), all Americans engaged in missionary and relief work in El Salvador, were abducted, tortured, and murdered in December 1980 by five members of the Salvadoran National Guard (the "Guardsmen"). Approximately three years later, in response to American pressure to punish the responsible parties, the Guardsmen were convicted of the crimes and sentenced to prison terms. In the period before and after this tragic incident, thousands of civilians in El Salvador were victimized by violence during a civil war in which both communist and colonialist forces competed with the government for control of the country. At the time of the murders and directly before, Defendant General Carlos Eugenio Vides Casanova was Director of the Salvadoran National Guard and Defendant General Jose Guillermo Garcia was El Salvador's Minister of Defense. Both defendants currently reside in Florida.

Subsequent to the murders of the churchwomen, Congress passed the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 at Historical and Statutory Notes to 28 U.S.C.A. § 1350.[1] The TVPA al-

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[1] "An individual who ... (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C.A. § 1350, note § 1(a), Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73.

lows victims of violations of international law, or those victims' representatives, to bring a civil cause of action in federal district court against commanders under the international law doctrine of command responsibility.[2] This doctrine makes a commander liable for acts of his subordinates, even where the commander did not order those acts, when certain elements are met. Relying on the TVPA, Plaintiffs-Appellants, for and on behalf of the estates of the churchwomen, filed suit against Defendants-Appellees in 1999 seeking to recover damages for the torture and murders. Appellants invoked the doctrine of command responsibility and alleged that the executions at issue were part of a pattern and practice of extrajudicial killings committed by the Salvadoran National Guard under Appellees' command.

At trial, Appellants offered evidence of the great number of atrocities committed against civilians at the hands of the Salvadoran military in the months preceding the churchwomen's deaths. The Generals conceded that they were aware of a pattern of human rights abuses in El Salvador during their tenures as Minister of Defense and Director of the National Guard, but argued that they did not have the ability to control their troops during this period. As part of their defense, Appellees called Edwin Corr, U.S. Ambassador to El Salvador from 1985 to 1988, to testify as both a fact and expert witness. After deliberations, the jury returned a verdict for Appellees. Appellants argue on appeal that the

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[2] "However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." S. Rep. No. 102-249, at 9 (1991).

jury instructions given at trial contained material misstatements of law and that Ambassador Corr's testimony was erroneously admitted because they had no pretrial notice of Appellees' intent to call Corr as an expert and received no expert report.

II. Discussion

A. The Jury Instructions

Appellants contend that the jury instructions in this case contained errors of law which placed on them the burden of establishing elements that they are not required to prove under either the TVPA or the international law which the TVPA has adopted. The instructions required Appellants to prove by a preponderance of the evidence first that the Guardsmen were under Appellees' "effective command," defined as the legal authority and the practical ability of the Generals to control the guilty troops, and second, that the Generals failed to take all reasonable steps to prevent or repress the murders of the churchwomen.[3] Appellants argue

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[3] The district court's jury instruction under the heading "Command Responsibility" read, in relevant part, as follows:
To hold a specific defendant/commander liable under the doctrine of command responsibility, each plaintiff must prove all of the following elements by a preponderance of the evidence:
(1) That persons under defendant's effective command had committed, were committing, or were about to commit torture and extrajudicial killing; and
(2) That defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command had committed, were committing, or were about to commit torture and extrajudicial killing; and
(3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of
(cont'd)

that both of these showings are properly affirmative defenses that the Appellees had the burden of proving at trial. Finally, Appellants contend that the district court's instructions erroneously included proximate cause as a required element before liability could be established under the TVPA and command responsibility doctrine.[4]

(... cont'd)

torture and extrajudicial killing or failed to investigate the events in an effort to punish the perpetrators.
"Effective command" means the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.

[4] The district court's jury instruction under the heading "Proximate Cause and Command Responsibility" read, in whole, as follows:
The plaintiffs may recover only those damages arising from those omissions that can be attributed to the defendant. Each plaintiff must therefore prove that the compensation he/she seeks relates to damages that naturally flow from the injuries proved. In other words, there must be a sufficient causal connection between an omission of the defendant and any damage sustained by a plaintiff. This requirement is referred to as "proximate cause."
As I have told you, international law and the law of the United States impose an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command to prevent torture and extrajudicial killing. If you find that one or more of the plaintiffs have established all of the elements of the doctrine of command responsibility, as defined in these instructions, then you must determine whether the plaintiffs have also established by a preponderance of the evidence that the church women's injuries were a direct or a reasonably foreseeable

(cont'd)

1. The Command Responsibility Instruction

Federal Rule of Civil Procedure 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. Pro. 51. This rule exists "to prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to his attention at the proper time." *Pate* v. *Seaboard R.R.*, 819 F.2d 1074, 1082 (11th Cir. 1987) (quoting *Industrial Dev. Bd.* v. *Fuqua Indus.*, 523 F.2d 1226, 1238 (5th Cir. 1975)); *see also Farley* v. *Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999).

This court, however, has recognized an exception to the general requirements of Rule 51 where the district court commits error "so fundamental as to result in a miscarriage of justice" if relief is not granted. *Iervolino* v. *Delta Air Lines, Inc.*, 796 F.2d 1408, 1414 (11th Cir.1986). Under this standard of review, generally referred to as plain error, an appellant must establish that: (1) an error occurred; (2) the error was plain; (3) it affected substantial rights; and (4) it seriously affected the fairness of the judicial proceedings. *United States* v. *Humphrey*, 164 F.3d 585, 588 n. 3 (11th Cir.

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consequence of one or both defendants' failure to fulfill their obligations under the doctrine of command responsibility.

Keep in mind that a legal cause need not always be the nearest cause either in time or in space. In addition, in a case such as this, there may be more than one cause of an injury or damages. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

1999). Therefore, if no objection to the challenged instruction was raised at trial, we only review for plain error. *United States* v. *Smith,* 231 F.3d 800, 807 (11th Cir. 2000). Because Appellants failed to object to the command responsibility instruction at trial, we review for plain error.[5]

The essential elements of liability under the command responsibility doctrine are: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3)

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[5] Although it does not affect the result, we do note that after the district court proposed a definition of "effective command" as the "legal authority and practical ability to exert control" over troops, Appellants suggested that a sentence be included with this definition to the effect that a commander cannot defend himself on the basis of ineffective command that he was in part responsible for creating. As the district court stated:
"[The instruction] now reads 'effective command means the commander'--it says has, I wonder if it should be had, '... the legal authority and the practical ability to exert control over his troops.' The plaintiff suggested that and another sentence be added to it, and the sentence reads, 'A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.'"
See also Plaintiffs' Requested Amendments to Proposed Jury Instructions, 10/31/00. The jury instruction eventually given included this exact language suggested by Appellants. Similarly, Appellants specifically proposed that they must prove by a preponderance of the evidence that each defendant "failed to take all necessary and reasonable measures within his power to prevent the commission of torture and extrajudicial killings...." Plaintiffs' Proposed Jury Instructions on Command Responsibility, 10/27/00.

that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes. Although the TVPA does not explicitly provide for liability of commanders for human rights violations of their troops, legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the Act.[6] Specifically identified in the Senate report is *In re Yamashita,* 327 U.S. 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946), a World War II era case involving the command responsibility doctrine in habeas review of the conviction of a Japanese commander in the Philippines by an American military tribunal. *See* S. Rep. No. 102-249, at 9 (1991). Describing *Yamashita*'s holding, the Senate Report stated that the Supreme Court found a foreign general "responsible for a pervasive pattern of war crimes (1) committed by his officers when (2) he knew or should have known they were going on but (3) failed to prevent or punish them." *Id.* In the years since *Yamashita* and the passage of the TVPA, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have been established, and their statutes contain language providing for imposition of com-

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[6] *See supra* note 2. The TVPA allows plaintiffs to bring civil actions against commanders, whereas much of the relevant authority on the command responsibility doctrine has arisen in the context of criminal proceedings before international tribunals. We find no indication from the legislative history, however, that when Congress adopted the doctrine from international law, it intended courts to draw any distinction in their application of command responsibility in the civil arena.

mand responsibility on substantively identical grounds to those enunciated in *Yamashita.*[7]

Appellants assert that once a plaintiff has proven these three prima facie elements by a preponderance of the evidence, the burden then shifts to the defendant to establish any affirmative defenses. In Appellants' view, possible affirmative defenses are that the commander did not have effective command over his troops, *i.e.* the practical ability to control them, or that he took all necessary and reasonable measures to prevent the abuses. Although never explicitly using these terms, Appellants seem to assume that this shift of burdens places both the burden of production, *i.e.*, the burden of coming forward, *and* the burden of persuasion on the defendants with regard to these affirmative defenses. We understand their argument to be that the instructions challenged here misstated the law of command responsibility by

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[7] "The fact that any of the acts referred to in article 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
Art. 7(3), Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) (May 25, 1993).
"The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
Art. 6(3), Statute of the International Criminal Tribunal for Rwanda (ICTR) (Nov. 8, 1994).

misallocating the burden of persuasion on these matters. Put another way, Appellants accept that they bear the burden of showing (1) a superior-subordinate relationship between the commander and the perpetrators, (2) the requisite knowledge on the part of the commander, and (3) the commander's failure to prevent or repress the abuses or to punish the perpetrators; they deny, however, that the requirements for proving these three elements are as onerous as the district court explained to the jury. They contend that contrary to the command responsibility instruction given, it is for the defendants to come forward with evidence sufficient to prove that they did not have the practical ability to control their troops or that they took all necessary and reasonable measures to control the troops, either one of which would serve to exonerate them from liability.

Appellants urge that their position that Defendants were required to show their lack of practical ability to control the guilty troops as part of an affirmative defense finds support in the Supreme Court's *In re Yamashita* decision. There the Supreme Court upheld on habeas review the military tribunal's authority to try General Yamashita, as well as its findings and jury instructions. *In re Yamashita,* 327 U.S. at 17, 25, 66 S.Ct. 340. Appellants read the decision as allocating the burden of persuasion to be applied for each issue in future command responsibility cases to whichever party raised that issue in front of the original *Yamashita* tribunal. Appellants maintain that at the military tribunal Yamashita attempted to show his lack of effective control over his troops, and insist that he would not have made this effort had he not carried the burden of persuasion on this matter.

Despite Appellants' assertions that the district court's definition of "effective command" misplaced the burden of persuasion, we find no plain error. *In re Yamashita* did not

explicitly address the allocation of the burdens on the elements of command responsibility. Nor is there any indication that the Court there ever considered how to allocate the burdens of production or persuasion in future command responsibility trials. Further, Appellants' contention that Yamashita's raising his lack of effective control before the American military tribunal necessarily implies that he carried the burden of persuasion on that issue is flawed. Yamashita might have raised his lack of effective control because he had the burden of production on the issue, although not the burden of persuasion. Alternatively, he may have believed that his most effective defense lay in pointing out facts that, if believed by the trier of fact, would establish that the prosecution could not carry out its burden of proving the elements of command responsibility.

The recently constituted international tribunals of Rwanda and the former Yugoslavia have applied the doctrine of command responsibility since *In re Yamashita,* and therefore their cases provide insight into how the doctrine should be applied in TVPA cases. Recent international cases consistently have found that effective control of a commander over his troops is required before liability will be imposed under the command responsibility doctrine. The consensus is that "[t]he concept of effective *control* over a subordinate in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised is the threshold to be reached in establishing a superior- subordinate relationship...." *Prosecutor* v. *Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 256;[8] *accord id.* at ¶ 266; *Prosecutor* v.

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[8] Although the decision of the Appeals Chamber in *Prosecutor* v. *Delalic* was handed down after the challenged jury instructions were given, the opinion in that case only reiterated what numerous other international tribunals had already decided on the

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Aleksovski, Judgment (Appeals Chamber ICTY, March 24, 2000) ¶ 76; *Prosecutor* v. *Blaskic,* Judgment (Trial Chamber ICTY, March 3, 2000) ¶¶ 295, 302 ("Proof is required that the superior has effective control over the persons committing the violations of international humanitarian law in question, that is, has the material ability to prevent the crimes and to punish the perpetrators thereof."); *Prosecutor* v. *Kayishema,* Judgment (Trial Chamber ICTR, May 21, 1999) ¶ 229 (stating that the "material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3)"); *Prosecutor* v. *Delalic,* Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶ 377, 378; *Prosecutor* v. *Akayesu,* Judgment (Trial Chamber ICTR, Sept. 2, 1998) ¶ 491. Many of these cases dealt with the situation converse to the one presented here, i.e., where a superior without *de jure* command was accused of having *de facto* control over the guilty troops. These cases emphasize, nonetheless, that the command responsibility theory of liability is premised on the actual ability of a superior to control his troops. A reading of the cases suggests that a showing of the defendant's actual ability to control the guilty troops is required as part of the plaintiff's burden under the superior-subordinate prong of command responsibility, whether the plaintiff attempts to

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issue prior to these instructions. *See e.g., Prosecutor* v. *Aleksovski,* Judgment (Appeals Chamber, ICTY March 24, 2000) ¶ 76; *Prosecutor* v. *Blaskic,* Judgment (Trial Chamber ICTY, March 3, 2000) ¶¶ 295, 302; *Prosecutor* v. *Kayishema,* Judgment (Trial Chamber ICTR, May 21, 1999) ¶ 229; *Prosecutor* v. *Delalic,* Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶ 377, 378; *Prosecutor* v. *Akayesu,* Judgment (Trial Chamber ICTR, Sept. 2, 1998) ¶ 491. We quote from *Delalic* because it states the matter with great clarity.

assert liability under a theory of *de facto* or *de jure* authority. *Prosecutor* v. *Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 196 ("Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility....The showing of effective control is required in cases involving both *de jure* and *de facto* superiors."). Explaining the difference in application of this requirement in *de jure* and *de facto* cases, the same tribunal announced, "In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced." *Id.* at ¶ 197.

Notably, the tribunal said that *de jure* authority over the guilty troops results in only a *presumption* of effective control. In other contexts, this court has held that a presumption shifts the burden of production with respect to the element it concerns, but not the burden of persuasion. *See Walker* v. *Mortham,* 158 F.3d 1177, 1184 (11th Cir. 1998) (distinguishing between "presumptions" and "inferences"); *see also* Fed.R.Evid. 301 (noting that presumptions create a burden of production for the party against whom the presumption is directed, but do not shift the ultimate burden of persuasion). Put another way, *Delalic* indicates that *de jure* authority of a commander over the troops who perpetrated the underlying crime is *prima facie* evidence of effective control, which accordingly can be rebutted only by the defense putting forth evidence to the finder of fact that the defendant lacked this effective control. *See* Black's Law Dictionary (7th ed. 1999) 579 (defining *prima facie* evidence as "[e]vidence that will establish a fact or sustain a judgment unless contrary evidence is produced"). Thus, although we do not decide the issue, we note that nowhere in any interna-

tional tribunal decision have we found any indication that the ultimate burden of *persuasion* shifts on this issue when the prosecutor--or in TVPA cases, the plaintiff shows that the defendant possessed *de jure* power over the guilty troops.

To the contrary, *Delalic* provides a strong suggestion that it is the plaintiff who must establish, in all command responsibility cases, that the defendant had effective control over his troops. That a *de jure* commander bears the burden of production on this issue does not affect the ultimate jury instruction that should be given. We previously have held that jury instructions are to address the ultimate burden of persuasion only, and should not needlessly confuse the jurors with which party held the burden of production at trial. *See Dudley* v. *Wal-Mart Stores, Inc.,* 166 F.3d 1317, 1321-22 (11th Cir. 1999) (noting that "[a]lthough statements like 'prima facie case' and 'burden of production' faithfully endeavor to track [the law], they create a distinct risk of confusing the jury") (quoting *Cabrera* v. *Jakabovitz,* 24 F.3d 372, 381 (2d Cir. 1994)). This reasoning recognizes that "the distinction between burden of persuasion and burden of production is not familiar to jurors, and they may easily be misled by hearing the word 'burden' (though referring to a burden of production) used with reference to a defendant in an explanation of that part of the charge that concerns a plaintiff's burden of persuasion." *Id.* (quoting *Cabrera,* 24 F.3d at 381).

In the end, then, there is ample authority contrary to Appellants' argument that Defendants bore the burden of persuasion on effective control. Decisions by the Yugoslav and Rwanda tribunals seem to allocate the burden of persuasion to plaintiffs on the issue of defendants' effective control. Even were we to read these cases in the light most favorable to Appellants, however, the decisions at least suggest that the burden of persuasion on this matter is not altogether certain.

We therefore hold that there was no plain error here because the district court's instruction included an element which properly must be proved in command responsibility cases, and no case law exists clearly assigning the burden of persuasion away from the plaintiff on this matter. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (holding that a district court cannot commit plain error in giving a jury instruction where the contours of the law on which it is instructing are "in a state of evolving definition and uncertainty"); *Osterneck* v. *E.T. Barwick Indus.*, 825 F.2d 1521, 1533 (11th Cir. 1987) (citing *Newport,* 453 U.S. at 256, 101 S.Ct. 2748, for the proposition that jury instructions cannot constitute plain error where the law charged was "uncertain and evolving").

With regard to the "necessary and reasonable measures" portion of the district court's instruction, which the court included as part of Appellant's necessary showing in establishing the third prong of command responsibility, the governing statutes of both the Rwanda and former Yugoslavia international tribunals use the precise language employed here. *See* Art. 6(3), Statute of the ICTR (Nov. 8, 1994); Art. 7(3), Statute of the ICTY (May 25, 1993). Despite Appellants' claim that the defendant ordinarily bears the burden of persuasion on this element, we have found no international tribunal decision that has addressed this issue. Rather, by not explicitly identifying who possesses the burden on this element, there seems to be a tacit assumption in the tribunal cases that the prosecutor whose burden replicates the burden of the plaintiff in TVPA command responsibility cases carries the burden to prove that the defendant failed to take necessary and reasonable measures to prevent the crime or punish the guilty troops. *See e.g., Prosecutor* v. *Blaskic,* Judgment (Trial Chamber ICTY, March 3, 2000) ¶ 294 ("[P]roof is required that: ... the accused failed to take the necessary

and reasonable measures to prevent the crime or punish the perpetrator thereof."). Either way, as with the issue of effective control, we find no plain error where the district court's instruction mirrored the language of the most recent indicia of customary international law on this point, and where no clear case law exists allocating the burden of persuasion to the defendant on whether he took all necessary and reasonable measures to control his troops.

Although case law from recent international tribunals is sufficient to convince us that no plain error occurred here in the giving of the command responsibility instruction, we observe that the statute of the recently ratified International Criminal Court, commonly referred to as the Rome Statute, supports our holding on this matter as well.[9] As the statute addresses the command responsibility doctrine, it provides relevant authority for the required elements in TVPA cases invoking the doctrine. Article 28 of the Rome Statute, in relevant part, reads:

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her *effective command and control,* or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such

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[9] Sixty countries were required to ratify the creation of the International Criminal Court as an authoritative international legal body. The Court was ratified by the requisite 60 countries on April 11, 2002, and its jurisdiction will begin July 1, 2002.

> crimes; and (ii) That military commander or person *failed to take all necessary and reasonable measures* to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Art. 28(a), Rome Statute of the International Criminal Court (July 17, 1998) (emphasis added). This language reinforces our holding that there was no plain error in either challenged portion of the command responsibility jury instruction.

2. The Proximate Cause Instruction

Appellants also argue that the proximate cause instruction given by the district court constitutes plain error, insisting that proximate cause is irrelevant under the doctrine of command responsibility. For support, they note that no international case has ever required such a showing for liability and that the Ninth Circuit has specifically rejected the argument that proximate cause is a required element of the doctrine. *See Hilao* v. *Estate of Marcos,* 103 F.3d 767, 774 (9th Cir. 1996).

"It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party." *United States* v. *Ross,* 131 F.3d 970, 988 (11th Cir. 1997) (quoting *Crockett* v. *Uniroyal, Inc.,* 772 F.2d 1524, 1530 n. 4 (11th Cir. 1985)). Where invited error exists, it precludes a court from "invoking the plain error rule and reversing." *United States* v. *Davis,* 443 F.2d 560, 564-65 (5th Cir. 1971).[10] This court has held that where a party,

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[10] Decisions by the former Fifth Circuit issued before October 1, 1981 are binding as precedent in the Eleventh Circuit. *See* (cont'd)

rather than just remaining silent and not objecting to a proposed jury instruction, responds to the court's proposal with the words "the instruction is acceptable to us," this constitutes invited error. *United States* v. *Fulford,* 267 F.3d 1241, 1247 (11th Cir. 2001). In *Fulford,* we decided that these words served to waive a party's right to challenge the accepted instruction on appeal. *See id.*

In this case, the record reveals that Appellants responded to the district court's proposed jury instructions with its own changes to the proximate cause section.[11] Where, as here, the instruction eventually given to the jury reflected changes that Appellants themselves proposed and to which they did not later object, we may find under *Fulford* that they have waived any assertion of error on appeal. Furthermore, at one point during a discussion between the district court and counsel, the court recited its understanding of the proximate cause requirement to which Appellants' counsel responded in agreement.[12]

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Bonner v. *City of Prichard, Ala.,* 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

[11] Plaintiffs' counsel stated, "We took that out of this and made it one charge under proximate cause."

[12] The exchange was as follows:
The Court: That the jury has a right to look at all of the evidence that has been presented, but that under the doctrine of proximate cause, the question is, is there a connection between, if you will, a violation of the doctrine of command responsibility and the injuries that were sustained here. Those are the only injuries for which compensation is being sought, not on any other injuries. But the
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Accordingly, whatever light international law might shed on proximate cause as it pertains to the command responsibility doctrine, we have no trouble concluding that the challenged instruction constituted invited error and decline to review for reversible error.

B. Ambassador Corr's Expert Testimony

Appellants argue that Appellees violated Local Rules 16.1 and 26.1 of the district court by failing to provide both adequate notice of Ambassador Corr's status as an expert and an expert report summarizing his testimony.[13] They did not depose Corr, as was their right,[14] and maintain that, as a result, they were severely prejudiced by their inability to cross-examine Corr effectively. Corr testified about the Generals' alleged efforts to stop human rights abuses and the difficulty of controlling their troops while El Salvador was experienc-

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jury can look at the totality of the evidence, but on the totality of the evidence whether the Plaintiffs have established their claims. Plaintiffs' Counsel: I am concerned that the jury understands that the totality of the evidence-let me think this thing through. I think what you said is exactly right.

[13] "Where expert opinion evidence is to be offered at trial, summaries of the expert's anticipated testimony or written expert reports ... shall be exchanged by the parties no later than 90 days prior to the pretrial conference...." S.D.Fla.R. 16.1.K (1998).

[14] "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. The deposition shall not be conducted until after the expert summary or report required by Local Rule 16.1.K is provided." S.D.Fla.R. 26.1.F(1)(c) (1998).

ing civil strife. Because Appellants insist that Appellees' pretrial disclosure designated Corr as a potential fact witness only,[15] they contend that the district court abused its discretion by failing to subject the defense to "appropriate penalties," as required by the Local Rules.[16] Appellants claim to have interpreted the witness list as identifying several matters on which Corr might testify for the period 1985-1988, based on his personal knowledge as the U.S. Ambassador during these years.

Initially, we comment that Appellants' claim not to have had any notice of Corr testifying as a possible expert witness is questionable. When Appellants received the defense's witness list eleven months before trial, listed under Corr's name, former position, and the dates he held that position were those matters as to which he might be called to testify; two of the six entries began with the word "opinion." This undoubtedly provided Appellants with some notice that

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15 The witness list included the following:

Ambassador EDWIN G. CORR
U.S. Ambassador to El Salvador 1985-1988
--Opinion about general situation in El Salvador: political, economic and military.
--Opinion about General Vides Casanova, Minister of Defense.
--Removing the Armed Forces from the political arena.
--Promoting the respect for the rights of all citizens.
--Prosecuting the counterinsurgency war in a continually professional manner.
--Institutionalization of democracy in El Salvador.

16 "Failure to comply with the requirements of this rule will subject the party or counsel to appropriate penalties, including but not limited to dismissal of the cause, or the striking of defenses and entry of judgment." S.D.Fla.R. 16.1.M (1998).

Corr was being offered as a potential expert witness.[17] Additionally, the dates under Corr's name were printed directly across from the diplomatic position he held during those years, in the same format (in bold and underlined). Appellants thus could reasonably have inferred that those years referred only to the dates during which Corr was U.S. Ambassador to El Salvador, and not the dates about which he was to testify. Although Appellants argue that they had no reason to depose Corr based on the witness list because the time period about which he was designated to testify, 1985-1988, came four and one-half years after the murders of the churchwomen, this makes little sense; Appellees surely had no reason to offer a fact witness who could testify based on personal knowledge only as to dates irrelevant to the case. This should have been another indication to Appellants that Corr was being offered as an expert. Moreover, the roster of witnesses offered by Appellees listed a number of other poten-

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[17] We recognize that Federal Rule of Evidence 701 allows for opinion testimony by non-expert witnesses where the offered opinions are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See* Fed.R.Evid. 701. Ambassador Corr's "opinion about [the] general situation in El Salvador: political, economic, and military," however, would seem more naturally to fall under Rule 702, governing testimony by experts. *See* Fed.R.Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

tial witnesses who had served in military or diplomatic positions, and listed their years of service in those positions directly across from their title in bold and underlined, exactly as was done for Ambassador Corr's entry.

All this being said, it is nonetheless true that Appellees did not comply with the requirement of the Local Rules to provide Appellants with an expert report summarizing Corr's expected testimony. Appellants, however, never objected to Appellees' failure to comply. Instead, they objected to the scope of the Ambassador's testimony, explaining to the district court that they did not recognize Ambassador Corr as an expert in Salvadoran military and political affairs for the time periods about which he was called to testify.[18] Although Appellants claim that they made their grounds for objection clear when they stated at trial that Corr had not been deposed, this comment does not constitute an objection on the basis of their failure to receive an expert report with sufficient clarity. Moreover, when the district court overruled Appellants' objections on Corr's qualifications as an expert for the time period relevant to the case, Appellants did not move to exclude the Ambassador, nor did they request a continuance for an opportunity to prepare or depose the witness. They claim such a request would have been futile, as Ambassador Corr was only available to testify that same day. Possible futility of the request, however, does not relieve

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[18] The exchange went as follows:

The Court: Do I assume, Mr. Klaus, that you are proffering the Ambassador as an expert in the area of El Salvador?

Defense Counsel: Yes, Your Honor. The Court: All right. Any objection to that?

Plaintiffs' Counsel: We do not recognize him as an expert for this time period, Your Honor.

The Court: All right, I will overrule that objection.

Appellants of their obligation to preserve error on those issues which they later seek to appeal.

Where a party has the opportunity to object, but remains "silent or fails to state the grounds for objection, objections ... will be waived for purposes of appeal, and this court will not entertain an appeal based upon such objections unless refusal to do so would result in manifest injustice." *United States* v. *Page,* 69 F.3d 482, 492-93 (11th Cir. 1995). We hold that where the list provided to Appellants eleven months prior to trial indicated that the witness providing the challenged testimony was an expert; where the Appellants were able to offer their own experts; where Appellants did not make known to the district court their objections to Appellees' failure to comply with the Local Rule regarding expert reports; and where we read the Local Rule providing "appropriate penalties" for failure to comply with the expert report requirement as lodging discretion with the district court on this matter, no manifest injustice will result from our refusal to entertain this appeal.

III. Conclusion

Based on the foregoing, we find no reversible error on the part of the district court.

AFFIRMED.

BARKETT, Circuit Judge, concurring:

I concur in the majority's decision. As to the command responsibility instruction, Appellants simply argue that the trial judge should have instructed the jury on the doctrine's "shifting burdens of proof." This argument is unavailing, as the majority holds, both because there is no existing law as to the appropriate allocation of burdens under the command responsibility doctrine and because, under our precedent, the jury is not instructed as to a shifting burden of production. Thus, there was no plain error regarding the command responsibility instruction.

In addition, although Appellants complain that the court erroneously failed to instruct the jury that the Generals had the burden of "affirmatively" establishing that they lacked the ability to control the perpetrators, such an "affirmative" defense would be aimed at disproving the existence of a superior-subordinate relationship, a component of the command responsibility doctrine that was not a contested issue at trial. As the majority notes, demonstrating a commander's "effective control" over his subordinates is a component of proving the "superior-subordinate" relationship required under the first prong of the command responsibility doctrine. In this case, the Generals conceded that they were the commanders of, and had authority over, the troops who committed the crimes. The Generals' defense was not directed at the first prong regarding commander status, but rather at the third prong of the doctrine requiring a showing that the commanders failed to take all necessary and reasonable measures to prevent or punish the commission of torture or extrajudicial killing.[19] The Generals proffered their testi-

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[19] The evidence required to prove the first and third prongs is somewhat related, as the first prong requires demonstrating that the (cont'd)

mony, the testimony of Ambassador Corr, supporting documentary evidence concerning the general state of affairs in El Salvador at the time of the murders, and the fact that the troops responsible for the murder were tried and convicted to rebut the existence of the third prong by demonstrating that the Generals had attempted to prevent, repress, and punish human rights violations. Given the fact that the Generals admitted their superior status in the command hierarchy, the Appellants' argument regarding "effective control" as it relates to the first prong is misplaced, as it addresses a subject not at issue in this case. Thus, for this additional reason, I do not believe the Appellants' argument in this regard has merit.

I also note that, although not at issue in this case, the district court's definition of "effective command" does not precisely state the law with respect to officials deemed to hold *de facto* but not *de jure* authority. The court defined an official with "effective command" as one possessing both "the legal authority and the practical ability to exert control over his troops." This "effective command" instruction is accurate insofar as it requires officials with *de jure* authority also to exercise "effective control." The instruction does not accurately reflect the standard for *de facto* officials, however, because those officials can be held responsible without a showing of legal authority. A *de facto* superior is an official who exercises "powers of control over subordinates" that are "substantially similar" to those exercised by *de jure* authorities. *Prosecutor* v. *Delalic,* ¶ 197 (Appeals Chamber ICTY,

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commander had the authority or *could* prevent or punish the crimes and the third prong requires demonstrating that the commander *failed* to take all necessary and reasonable measures to prevent or punish the crimes.

Feb. 20, 2001). As the majority clearly establishes, current international law provides that an official without legal authority may be held responsible for others' violations of international law where that official exercised a degree of control sufficient to confer *de facto* authority.

As to the proximate cause instruction, I agree with the majority's resolution of that issue because I believe a fair reading of our Circuit precedent holds that if error is invited, we may not review the error even if it is harmful. *See, e.g., United States* v. *Fulford,* 267 F.3d 1241, 1247 (11th Cir. 2001); *United States* v. *Ross,* 131 F.3d 970, 988 (11th Cir. 1997). However, I believe we should reconsider that precedent and agree with the Sixth and Ninth Circuits, which have held that invited error may result in reversal in certain "exceptional situations."[20] *See, e.g., United States* v. *Sharpe,* 996 F.2d 125, 129 (6th Cir. 1993); *United States* v. *Ahmad,* 974 F.2d 1163, 1165 (9th Cir. 1992) ("An invited error is only cause for reversal in the 'exceptional situation' in which it is 'necessary to preserve the integrity of the judicial process or prevent a miscarriage of justice.'") (internal citations omitted); *United States* v. *Schaff,* 948 F.2d 501, 506 (9th Cir. 1991). In my opinion, one of these "exceptional situations" arises where there is no evidence that a party has "invited" error in bad faith and where substantial injustice is the result of that error. This case presents such a situation. There was no bad faith alleged on the part of the Appellants, the instruction requiring proof of proximate cause was legally errone-

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[20] Only the *en banc* court or the Supreme Court may overrule the precedent established by a prior panel holding. *See, e.g., Smith* v. *GTE Corp.,* 236 F.3d 1292, 1300 n. 8, 1302-03 (11th Cir. 2001); *Turner* v. *Beneficial Corp.,* 236 F.3d 643, 648-50 (11th Cir. 2000), *vacated by* 242 F.3d 1023 (11th Cir.2001) (*en banc*); *United States* v. *Hogan,* 986 F.2d 1364, 1369 (11th Cir. 1993).

ous, and the record reflects that the error had a clear impact on the jury's determination. In my judgment, the proximate cause instruction calls into question the "integrity of the judicial process," thereby warranting reversal.

First, the instruction was erroneous because the concept of proximate cause is not relevant to the assignment of liability under the command responsibility doctrine. The doctrine does not require a *direct* causal link between a plaintiff victim's injuries and the acts or omissions of a commander. Once a plaintiff establishes a *prima facie* case by proving the doctrine's three prongs, the command responsibility doctrine requires no further showing to assign liability unless the commander presents a defense. In describing the scope of liability under the TVPA, the Senate Report urges that "[c]ourts should look to ... interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible." S. Rep. No. 102-249, at 8 (1991). If a commander's subordinates engage in a pattern of crimes about which that commander knew and failed to prevent or repress, then the commander bears responsibility for those acts absent a defense.

The Appellees justify the proximate cause instruction by arguing that a suit brought under the TVPA is a tort action, and, as such, requires proof of causation. This assertion misconceives the point at which causation must be shown. Causation must be demonstrated between the victims' injuries and the armed forces that committed the crimes. Causation, therefore, was undisputedly established in this case: the troops raped and murdered the nuns. Upon proof of its three prongs, the command responsibility doctrine assigns responsibility for those crimes to the commander of the troops, absent any defense.

In *Hilao* v. *Estate of Marcos,* 103 F.3d 767, 774 (9th Cir. 1996), the Ninth Circuit expressly held that proximate cause is not an element of command responsibility. 103 F.3d at 776-779. No federal court considering a case brought under the TVPA has required plaintiffs to show proximate cause between their injuries and the acts or omissions of an executive commander. The ICTY has treated the issue in a manner similar to the *Hilao* Court. The Trial Chamber in *Prosecutor* v. *Delalic* held that proof of causation is not an independent requirement for the imposition of command culpability. The Trial Chamber noted that there is no causal connection "between an offense committed by a subordinate and the subsequent failure of a superior to punish the offense," and concluded that this demonstrates the absence of causality as an element of the command responsibility doctrine. *See Prosecutor* v. *Delalic,* Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶ 398-400.

Indeed, a proximate cause requirement practically eviscerates the command responsibility doctrine's theory of liability. It is not surprising, therefore, that no opinion addressing the doctrine includes proximate cause as a required element of proof. Instead, case law consistently asserts that commanders with executive responsibility who know or should know of a pattern or practice of abuse face a high presumption of liability, and causation is presumed to be the result of their failure to prevent those individual crimes.

Second, it is clear that the proximate cause instruction in this case confused the jurors, a fact demonstrated by four of the five questions of the jury to the court. Question 2 inquired: "Our obligation as jurors is to determine the guilt or innocence based on the three questions under command responsibility only?" Similarly, Question 3 asked: "Are there any other criteria other than command responsibility that we

have to concern our decision with?" Question 4 pondered whether liability turned on the General's responsibility for the "crimes against the people of El Salvador as a whole" or just the crimes against the nuns. And finally, Question 5 asked for reassurance of the jury's understanding of the importance of proximate cause: "[I]t seems that proximate cause ... becomes a logical element, number four [in addition to the three prongs of the command responsibility doctrine] if and only if 1[,] 2[,] and three [sic] have been clearly established." These questions show that the jury may have found the Generals responsible for the crimes against the nuns but for the court's erroneous proximate cause instruction. The questions also make clear that the jury instructions left "the jury to speculate as to an essential point of the law," an error "sufficiently fundamental to warrant a new trial despite a party's failure to state a proper objection." *Pate* v. *Seaboard R.R., Inc.*, 819 F.2d 1074, 1083 (11th Cir. 1987) (quotation omitted). The erroneous proximate cause instruction thus led to "substantial injustice" warranting reversal of this judgment because the juror questions offer strong evidence of confusion and suggest that the jury's determination was significantly influenced by a legally erroneous instruction.

I believe that the requirements of justice would be served in this case by a rule that would permit us to review an "invited" but erroneous jury instruction where there is no evidence that counsel for the objecting party permitted the error in bad faith, and where it is clear that the jury misperceived the law and based its determination on this misperception.

[EXCERPTS FROM JURY INSTRUCTIONS AND TRIAL TRANSCRIPT]

[Jury Instructions, pp. 6-7:]

COMMAND RESPONSIBILITY

A commander may be held liable for torture and extrajudicial killing committed by troops under his command under two separate legal theories. The first applies when a commander takes a positive act, *i.e.*, he orders torture and extrajudicial killing or actually participates in it. The second legal theory applies when a commander fails to take appropriate action to control his troops. This is called the doctrine of command responsibility, and it is upon this doctrine that the plaintiffs seek to hold the defendants liable. The doctrine of command responsibility is founded on the principle that a military commander is obligated, under international law and United States law, to take appropriate measures within his power to control the troops under his command and prevent them from committing torture and extrajudicial killing. Plaintiffs contend that the defendants failed to exercise proper control over the troops under their command.

To hold a specific defendant/commander liable under the doctrine of command responsibility, each plaintiff must prove all of the following elements by a preponderance of the evidence:

(1) That persons under defendant's effective command had committed, were committing, or were about to commit torture and extrajudicial killing; and

(2) That defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command had

committed, were committing, or were about to commit torture and extrajudicial killing; and

(3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing or failed to investigate the events in an effort to punish the perpetrators.

"Effective command" means the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.

* * *

[Jury Instructions, pp. 9-10]

PROXIMATE CAUSE AND COMMAND RESPONSIBILITY

The plaintiffs may only recover those damages arising from those omissions that can be attributed to the defendant. Each plaintiff must therefore prove that the compensation he/she seeks relates to damages that naturally flow from the injuries proved. In other words, there must be sufficient causal connection between an omission of the defendant and any damage sustained by a plaintiff. This requirement is referred to as "proximate cause."

As I have told you, international law and the law of the United States impose an affirmative duty on military commanders to take appropriate measures within their power

to control troops under their command to prevent torture and extrajudicial killing.

If you find that one or more of the plaintiffs have established all of the elements of the doctrine of command responsibility, as defined in these instructions, then you must determine whether the plaintiffs have also established by a preponderance of the evidence that the church women's injuries were a direct or a reasonably foreseeable consequence of one or both defendants' failure to fulfill their obligations under the doctrine of command responsibility.

Keep in mind that a legal cause need not always be the nearest cause either in time or space. In addition, in a case such a [sic.] this, there may be more than one cause of an injury or damages. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

[Trial Transcript, pp. 2232-33]

And then I have gone into what is the Doctrine of Command Responsibility and what a plaintiff needs to prove in order to establish or to hold the commander liable for failing to take appropriate action. And I have set that out on the top of page seven.

Now, I wanted to mention this because we have had discussions about how connected does that have to be to the murder of the American churchwoman, and it occurs to me that that connection is what proximate cause is all about.

Remember, I think it was the Hilao case where on appeal one of the contentions was that it was error to instruct on

proximate cause, that somehow the command responsibility all by itself was all you needed.

But you come back to our case, and the allegations in our case, and whether the Plaintiff attempted to prove, I think is that there was a pattern, one might even argue a long established pattern of military commanders not holding anybody accountable when a member of the military engaged in torture or extrajudicial killing.

So, it seems to me that first part really has – simply, the doctrine, whether it came into play in the relevant time period, it is the proximate cause, all right? If the Plaintiff can establish that troops were engaging in torture and extrajudicial killing, if the Plaintiffs can establish that the Defendants knew about this, and third that the Defendants did not do anything to stop it, then the question becomes under the concept of proximate cause whether the Plaintiff can show the Defendants failure to take action is what resulted in the death of these women.

That is, had the military commander taken appropriate measures, is it reasonable to assume we wouldn't be here today.

My point is, I think in reflecting on it, it is the proximate cause instruction that is appropriate, and secondly that pull these facts into the case, that is, into the allegation is being made here.

* * *

[ORDER DENYING REHEARING AND REHEARING *EN BANC*]
[UNREPORTED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 20 2002
THOMAS K. KAHN
CLERK

No. 01-10357 BB

WILLIAM P. FORD, for and on behalf of the Estate of Ita C. Ford, JULIA CLARK KEOGH, for and on behalf of the Estate of Mary Elizabeth Clarke, also known as Maura Clarke, JAMES KAZEL, for and on behalf of the Estate of Dorothy Kazel, MICHAEL R. DONOVAN, for and on behalf of the Estate of Jean Donovan,

Plaintiffs-Appellants,

versus

JOSE GUILLERMO GARCIA, an individual, CARLOS EUGENIO VIDES-CASANOVA, an individual,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ____F.2d____).
Before: CARNES, BARKETT and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Phyllis Kravitch]
UNITED STATES CIRCUIT JUDGE

MOTION FILED
OCT 15 2002

No. 02-405

(2)

In The
Supreme Court of the United States

WILLIAM P. FORD, et al.,

Petitioners,

vs.

JOSE GUILLERMO GARCIA

and

CARLOS EUGENIO VIDES-CASANOVA,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE CENTER FOR JUSTICE & ACCOUNTABILITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Rule 37.2 of the rules of this Court, the Center for Justice & Accountability respectfully moves this Court for leave to file the attached brief as Amicus Curiae in support of the Petition for Writ of Certiorari. This motion and brief has been served on all separately represented parties pursuant to Rule 29.3 of this Court, and proof of service filed with the Clerk. The Petitioners have orally consented. In a telephone conversation with the office of Kurt Klaus, counsel for the Respondent, his office indicated a consent to the filing of this Amicus Brief. Unfortunately, due to the fact that counsel for the Respondent is out of the country, the Center for Justice & Accountability was unable to obtain written consent.

For these reasons the Center for Justice & Accountability respectfully requests leave to file the attached brief as Amicus Curiae.

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RULE

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BRIEF OF AMICUS CURIAE THE CENTER FOR JUSTICE & ACCOUNTABILITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE[1]

The Center for Justice & Accountability ("CJA") is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold their perpetrators accountable. CJA brings civil lawsuits under the Alien Tort Claims Act and the Torture Victim Protection Act against perpetrators who live in or visit the United States, and has participated as an *amicus curiae* in several cases in order to strengthen the body of law relevant to our work. CJA's Board of Directors and Legal Advisory Council includes leading practitioners and academics in the field of international law and its application in U.S. courts. CJA served as co-counsel in *Romagoza, et al. v. Garcia, et al.*, a case against the same two generals who were the defendants in the instant case. In *Romagoza*, the jury found the generals liable under the command responsibility doctrine and ordered them to pay $54.6 million to the three plaintiffs, who had survived torture in El Salvador.

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[1] Pursuant to Rule 37.6, counsel for Amicus Curiae hereby states that this brief was authored in whole by counsel, and no other party made any monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Review should be granted in this case to correct the mischief that will be caused by the erroneous addition of a proximate cause requirement to actions brought under the Torture Victims Protection Act of 1991 ("TVPA" or "the Act"). Review is also necessary to correct the equally erroneous imposition of a burden of persuasion upon torture victims with regard to disproving an element of a defense available to defendants under the Act.

These erroneous rulings threaten to undermine the usefulness of the TVPA in bringing to justice those who commit acts of torture and extrajudicial killing.

It is necessary for this Court to review and correct the erroneous addition of a proximate cause element to actions brought under the TVPA. There is no support or provision in the TVPA for the addition of such an element. The TVPA is, in part, a statutory extension of the Command Responsibility Doctrine which evolved from this Court's decision in *In Re Yamashita,* 327 U.S. 1 (1946). This same Command Responsibility Doctrine has become a part of customary international law. The Command Responsibility Doctrine, by its very nature, excludes the possibility of the defense of a lack of proximate cause.

Adding an element of proximate cause is unwarranted under domestic and international law. The addition of such an element would simply provide another layer of defense for those accused of torture and extrajudicial killing under the Act. It would also place an additional burden upon those torture victims seeking justice under the Act. This result is contrary to Congressional intent in the enactment of the TVPA, as well as international law.

It is also necessary for this Court to review and clarify the nature of the burden of persuasion under the TVPA. Placing the burden of persuasion upon torture victims and their families ignores the unique nature of the role of military commanders in having responsibility for the discipline and behavior of their units. The imposition of the burden also ignores the fact that these commanders have the first and best access to knowledge of steps they may have taken to exercise command and control over units accused of torture and extrajudicial killings.

This case provides this Court with an opportunity to correct and clarify the necessary proof and burdens for actions brought under the TVPA. By doing so the Court can ensure an accurate reading of its own *Yamashita* decision, and the Command Responsibility Doctrine developed from that decision.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO CORRECT THE ERRONEOUS ADDITION OF ELEMENTS TO AN ACTION UNDER THE TVPA THAT ARE INCONSISTENT WITH CONGRESSIONAL INTENT AND DOMESTIC AND INTERNATIONAL LAW.

On the fourth anniversary of the infamous attack on Pearl Harbor, this Court's *Yamashita* decision addressed whether the law of war imposes a duty on military commanders to take appropriate measures to prevent their troops from committing acts of brutality against noncombatants. The Court reasoned that since the entire purpose of the law of war was to protect civilian populations and prisoners of war, it was appropriate to prevent violations

of that law by reliance on military commanders who are responsible for their subordinates. *Yamashita* at 14-15. The Command Responsibility Doctrine which emerged from this holding applies criminal accountability to military and civilian leaders for unlawful acts committed by personnel under their charge if they knew, or should have known, of these acts and failed to prevent them or punish the perpetrators. The doctrine is premised on the view that superiors are in the best position to prevent the commission of atrocities by their subordinates. In his review of General Yamashita's conviction General MacArthur restated this duty: "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society." *Order of General Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, February 6, 1946*, reprinted in Leon Friedman, *The Law of War, A Documentary History*, pp. 1598-1599 (1972).

The international legal community adopted and applied this principle in post-war International Military Tribunals conducted in Europe and the Far East. See *United States v. Wilhelm von Leeb* ("*High Command Case*"), *United Nations War Crimes Commission, XII Law Reports of Trials of War Criminals 1* (1948), *United States v. Wilhelm List* ("*Hostage Case*"), *United Nations War Crimes Commission, VIII Law Reports of Trials of War Criminals 34* (1948), *Tokyo Tribunal Cases*, *The Tokyo War Crimes Trials,* reprinted in Friedman at 1029-1031. See also *Prosecutor v. Delalic*, Judgment (Trial Chamber ICTY, Nov. 16, 1998) ¶¶338-363. International conventions have codified the doctrine, and expanded it to all individuals

exercising effective control over subordinates in international or internal armed conflicts. Several international tribunals (for Rwanda and the former Yugoslavia) and mixed domestic-international tribunals (e.g. for East Timor) have used the doctrine to impose individual criminal responsibility to those in command of units committing war crimes.

Because this Court first articulated the fundamentals of what has now become the Command Responsibility Doctrine, it is uniquely positioned in terms of authority, and responsibility, to address the troubling mutation of the doctrine in the case at bar. Neither the TVPA, nor expressions of the Command Responsibility Doctrine in international law, provide authority for the addition of the element of proximate cause as imposed in this case. Similarly, the imposition of a burden of persuasion upon torture victims suing under the TVPA is completely at odds with Congressional intent, and contradicts pronouncements of international law. For these reasons this case presents an opportunity for this Court to prune these erroneous and unwarranted additions from the requirements of the TVPA, and international law.

II. THE ERRONEOUS ADDITION OF "PROXIMATE CAUSE" AS A NECESSARY ELEMENT OF AN ACTION BROUGHT UNDER THE TVPA THREATENS TO UNDERMINE THE USEFULNESS OF THE STATUTE AND THE COMMAND RESPONSIBILITY DOCTRINE IN BRINGING WAR CRIMINALS TO JUSTICE UNDER DOMESTIC AND INTERNATIONAL LAW.

In this case the District Court Judge gave a jury instruction defining the three elements of the Command

Responsibility Doctrine, but then erroneously added a fourth element requiring a proximate cause link between the acts of the Generals, and the rape and murder of the churchwomen. The requirement of such a "proximate cause" element finds no support in the TVPA, or related international law.

The TVPA does not contain any specific language referring to proximate cause. The legislative history of the Act makes clear that the TVPA was articulating customary international law and the Command Responsibility Doctrine. The legislative history specifically states: "Responsibility for torture, summary execution or disappearance extends beyond the person or persons who actually committed the acts – anyone with higher authority who *authorized, tolerated, or knowingly ignored these facts*" S.Rep.No. 102-249 at 8 (1991) (emphasis added). This language is consistent with the Command Responsibility Doctrine, and it is obvious that the intent of Congress was to incorporate the Command Responsibility Doctrine into the TVPA. The decision below of the Eleventh Circuit recognized this. Pet.App. 8a.

As set forth in the Senate Report and U.S. case law, the Doctrine of Command Responsibility requires a plaintiff to prove three *and only three* elements: (a) the commander had a superior-subordinate relationship with the troops that committed the human rights abuses; (b) the commander knew, or should have known, that these troops were committing such offenses; and (c) the commander failed to prevent or repress the abuses. Once these three elements are met, a commander may be held criminally and civilly liable for the human rights violations committed by subordinates unless he presents affirmative defenses to overcome the presumption of liability. See Ilias

Bantekas, *The Contemporary Law of Superior Responsibility,* 93 Am. J.Int'l L. 573 (1999).

The decision of the Trial Judge to impose a proximate cause element also squarely conflicted with the only Circuit Court of Appeals decision to pass on the question. In *Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996), the court approved of imposition of liability upon a foreign leader who directed, ordered, conspired with, or aided the military in torture, summary execution and disappearances, or had knowledge of that conduct and failed to use his power to prevent it. *Id.* at 776, 777.

Despite this authority, the Trial Judge added this proximate cause element, and in doing so set up an additional, unwarranted, defense for the Generals. This is not only contrary to the legislative history and intent of Congress in enacting the statute, but also important principles of international law regarding the Command Responsibility Doctrine, which holds military commanders responsible for the acts of their subordinates, although those commanders might not have been principals to the criminal acts. This is the fundamental tenet of the Command Responsibility Doctrine, and without it, not only torture victims, but other victims of war crimes, will be greatly impeded in bringing to justice those responsible for crimes against humanity.

This Court perhaps best explained the necessity and logic of this principle in its decision in *Yamashita*:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its

> purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the *control of the operations of war by commanders who are to some extent responsible for their subordinates.*

Id. at 15 (Emphasis Added). *Yamashita* recognized, and the world has adopted as customary international law, that commanders must be responsible for the actions of their subordinates in order for society to have any control over military units and their compliance with humanitarian laws.

International law has also recognized that it is simply illogical and incompatible with the Command Responsibility Doctrine to have a proximate cause element. None of the international treaties setting forth the Command Responsibility Doctrine include a proximate cause element. None of the international or mixed domestic-international tribunals inject such a requirement. Perhaps the most compelling articulation of the reasoning rejecting proximate cause as an element is contained in an important international law precedent from the International Criminal Tribunal for the Former Yugoslavia. *Prosecutor v. Delalic, at* ¶¶396-400. The panel emphasized that the third prong of the Command Responsibility Doctrine – failure to punish – cannot logically share a causal connection with an underlying Act. "The very existence of the principle of superior responsibility for failure to punish . . . demonstrates the absence of a requirement of causality as a separate element of the doctrine of superior responsibility." *Id.* at ¶ 400. With the addition of a proximate cause

element, a superior who learns of atrocities committed by his subordinates, and fails to discipline for these violations of the law of war would face individual criminal responsibility under international law, but escape civil liability in the United States because causation is lacking. The purposes of the TVPA could not be more ill served.

Beyond the conflict with the TVPA, authoritative precedent, and international law, the addition of a proximate cause element is fundamentally incompatible with the unique nature of military organizations, and the necessities of command responsibility that gave rise to the Command Responsibility Doctrine. It is a universal tenet of military organizations that a commanding officer is responsible for everything that his command does, or fails to do. *U.S. Department of Army Field Manual 101-5, Staff Organization and Operations 1-1* (May 1997). In such an organization the commander is ultimately responsible for the order and discipline of the unit, the training and competence of the force, and the welfare, morale, and conduct of the unit. *Id.;* Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility and Contemporary Military Operations,* 164 Mil.L.Rev. 155.

This concept of complete control and command places special responsibilities on the shoulders of a commanding officer to ensure that his unit complies with the dictates of law. In fact, society is entitled to the assurance that the commanding officer will do so:

> The military is a unique society where the commander has tremendous authority over subordinates not normally extended to superiors in the civilian sector. Coupled with significant lawful control over the troops is the commander's stewardship over a unit's tremendously awesome

> destructive capabilities. Mankind must, therefore, rely on commanders to use their authority to control both the military force's organic capacity for destruction and the conduct of their subordinates. Commanders have both a moral and legal role in preventing atrocities that could potentially be committed by subordinates against non-combatants . . .

Id. at 166.

In this unique context of a military organization it is fanciful to talk of proximate cause as being a necessary element of an action against a commander of a unit perpetrating war crimes. The military commander expects rightly to have the absolute obedience of troops under his command. If the order is given, it is fully expected that it will be carried out. By the same token, if a commanding officer seeks to control unlawful actions by his subordinates, it is fully expected that this will be effective. To inject a proximate cause requirement into a TVPA action against a military commander is to ignore this fundamental principle of the nature of military organizations. Those who fail to carry out their responsibility to control the military organizations entrusted to them should not have the benefit of being able to argue that, like some civilian organization, they had no hand in the proximate cause of the actions of their subordinates.

Yamashita, and the subsequent development of the Command Responsibility Doctrine in international law, is of little value to the legal community, and the world at large, if proximate cause is a necessary element. In fact, even General Yamashita may not have been held accountable under the Trial Judge's instruction. Few Filipinos brutalized by Japanese troops could have shown a direct

causal connection between the omissions of General Yamashita, and their individual torture or extrajudicial killings. That the addition of proximate cause to the Command Responsibility Doctrine would likely negate the result in *Yamashita* shows the error of imposing that additional element. Adding a proximate cause element greatly undermines the utility of the Command Responsibility Doctrine and the usefulness of the TVPA as a method of bringing war criminals to justice.

III. PLACING THE BURDEN OF PERSUASION ON THE VICTIMS OF TORTURE IN ACTIONS BROUGHT UNDER THE TVPA IS CONTRARY TO CONGRESSIONAL INTENT, ANALOGOUS CIVIL LAW AND INTERNATIONAL LAW.

Allocation of the burden of persuasion in civil cases arising under the TVPA is a matter of first impression. The Trial Judge considered *Yamashita*, and the judgments of international tribunals, and concluded that a showing of "effective" control over guilty troops is a prima facie requirement before liability will be imposed under the Command Responsibility Doctrine. As a result, the Eleventh Circuit did not find plain error in a jury instruction which placed the burden of production and persuasion on plaintiffs. The Court of Appeals noted that they could find no international judgments which shifted the ultimate burden of persuasion away from the plaintiffs, and felt the law is at best uncertain on this point. Pet.App. 14a.

This analysis overlooks a critical distinction: *Yamashita* and the international judgments referenced were criminal tribunals. International criminal tribunals place the burden of proof on the prosecutor because of the grave

penalties and consequences at stake. This is in sharp contrast with the case at bar, and actions under the TVPA.

The TVPA is a civil statute, albeit aimed at heinous criminal behavior. Rather than looking to criminal law for guidance, Congress instructed that the scope of liability under the TVPA should be derived from interpretations of actual or apparent authority set forth in agency theory. The analysis under agency law hinges on whether a third party reasonably believes an agent continues to act with authority, and includes the possibility of lingering apparent authority even after the termination of actual authority. (See *Restatement (Third) of Agency* §202, §203 and *§311* (T. D. No. 2, 2001); *§ 3.11 Comment (c).* Notably, in some cases a principal's death or loss of capacity does not by itself end apparent authority. *Schlock v. United States,* 56 F. Supp. 2d 185, 193 (D. R. I. 1999.).

Comparisons between the role of business employers and military superiors in civil actions are illuminative. Both exercise an unusual amount of control over those they employ and lead, and can reasonably anticipate that certain types of unlawful acts might be committed by those under their responsibility. Employers and commanders have the ability to impose direct forms of sanctions to deter illegal behavior. Employers and commanders are also in a better position to shoulder the burden of proving that adequate measures were instituted to avoid the harm which ensued. If this Court places elevated responsibility upon employers, military commanders warrant even heavier burdens because of their unique command role.

A weighing of the equities also would require placing the burden of persuasion on commanders, given that they are in a far stronger position to prove their lack of effective

control than are plaintiffs to prove the converse. Plaintiffs in TVPA actions are disadvantaged at every turn. Torture and extrajudicial killings generally occur in remote locations, hidden from all scrutiny, and often go undiscovered for substantial periods. Appropriate and timely investigations into such atrocities are unlikely. Moreover, owing to claims of national security, civilians can rarely gain access to the information needed to establish effective command; e.g., charts showing the chain of command; statements of the responsibilities of various officers; rules of engagement; policies regarding permissible interrogation techniques; records regarding complaints of torture and what was done with them; and internal assessments of what the impact would be if torturers were punished. Absent access to such documents, plaintiffs must rely upon finding inside witnesses who are willing to step forward to testify against their superiors or colleagues. Such inside witnesses have on occasion stepped forward, and, on occasion, such as under the military dictatorships that ruled El Salvador at the time of the murders at issue, were killed or suffered other retaliation.

Placing the burden of persuasion on torture victims, or their personal representatives, is not consistent with the legislative history of the TVPA, is not mandated by its terms, and favors those the law sought to make accountable. In another telling consideration, it is unclear whether General Yamashita would have been criminally accountable if the burden of persuasion had been on the allied powers to show he exercised "effective" control over his subordinates. It would have been difficult, if not impossible, for prosecutors to piece together and prove the state of the Japanese command and control structure in

the last days before Japanese surrender. Instead, Yamashita quite rightly raised his lack of effective control as an affirmative defense and attempted to sustain it through proof. The Generals in this case should properly have had to make out this defense in the same way.

CONCLUSION

In *Yamashita,* this Court defined when a commander may be held criminally responsible for the acts of subordinates. That ruling was the foundation for the Command Responsibility Doctrine which has gained the status of customary international law. Congress incorporated that doctrine in the TVPA, and victims of torture now rely on it in civil courts to gain some measure of accountability from their torturers. By inserting a proximate cause requirement, and placing the burden of persuasion on the victims of torture, the decision below threatens to undermine the usefulness of the TVPA and reverse great strides in humanitarian law. Four American churchwomen were kidnapped, raped and murdered in El Salvador. Their quest for justice continues through their representatives more than two decades later. This Court should accept this case, clarify the causal and burden allocations of the TVPA, and in so doing take another small step in the struggle to put an end to the impunity of commanders who

authorize, tolerate, or ignore the commission of flagrant human rights violations.

Respectfully submitted,

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